

No. 13696

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United States  
Court of Appeals  
for the Ninth Circuit.

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PACIFIC AMERICAN FISHERIES, INC.,  
a Corporation,

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,

Appellee.

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Transcript of Record

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Appeal from the District Court  
for the Territory of Alaska  
First Division



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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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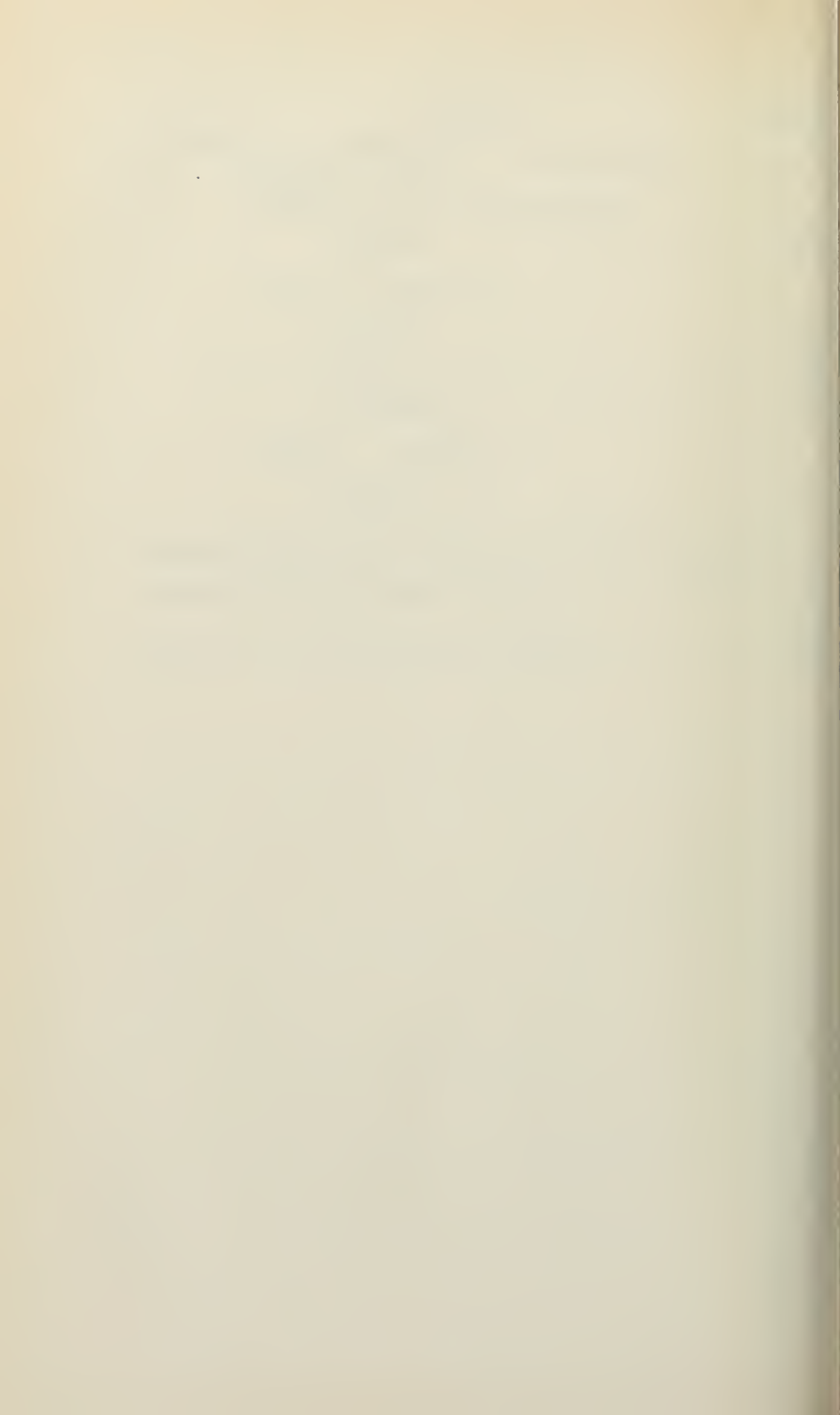
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NAMES AND ADDRESSES OF ATTORNEYS

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Juneau, Alaska,

For Appellant.

HON. J. GERALD WILLIAMS,

Territorial Attorney General, by

JOHN DIMOND,

Assistant,

For Appellee.



In the District Court for the Territory of Alaska  
Division Number One at Juneau

Civil Cause No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a  
Corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,

Defendant.

### COMPLAINT

Plaintiff complains and alleges of defendant and prays as follows:

#### First Cause of Action

##### I.

That plaintiff is a corporation organized under the laws of Delaware and qualified to do business in the Territory of Alaska, and it has paid all its corporation license fees due the Territory and complied with all laws relating to foreign corporations doing business therein, and it operates salmon canneries at Alitak, Kasaan, King Cove, Naknek, Nushagak, Petersburg, Port Moller, Shumagin and Excursion Inlet and on the floating cannery known as Floater #1; and it operated at all of these places during the years 1949 and 1950, except Excursion Inlet and Floater #1 which were operated in 1950 and 1951.

## II.

That plaintiff is a taxpayer within the Territory of Alaska and it pays annually large sums in taxes and license fees to the Territory, and various other taxes, including taxes on real property in certain municipalities and school districts of the Territory, and it has been such taxpayer for many years prior to the date of this complaint.

## III.

That the defendant M. P. Mullaney is the duly appointed and acting Commissioner of Taxation for the Territory of Alaska, and he was such at all times mentioned herein.

## IV.

That plaintiff employs a large number of fishermen in the operation of its salmon canneries each year, and it did employ a large number of both resident and nonresident fishermen in its operations during the years 1949, 1950 and 1951, and it paid the defendant, as a license tax under the provisions of Chapter 66, Session Laws of Alaska, 1949, \$50.00 for each nonresident fisherman in its employ for each year he was employed by the company, to wit: 1949, 1950 and 1951, paying a total of 696 separate fees of \$50.00 each during those three years, which amounted to the sum of \$34,800.00.

## V.

That this sum of \$34,800.00 was paid the defendant Commissioner of Taxation in 1949, 1950 and 1951, under duress, compulsion and protest and not

voluntarily, and in order to avoid criminal penalties imposed on the plaintiff under the provisions of Chapter 66 and in order to avoid irreparable loss of plaintiff's property. That attached hereto and made a part of this complaint as though fully set forth in this paragraph is a list of all nonresident fishermen employees of plaintiff for whom plaintiff paid the license fees, and the list sets forth the salmon canneries where these employees were employed, the dates of payment of the license fees in each case, the number of the check or draft by which paid, together with a summary or recapitulation of the names, dates, payments, etc., and which list and summary are marked Exhibit "A" and prayed to be read as a part of this paragraph as though fully set forth herein.

#### VI.

That the tax or license fee levied by the provisions of Chapter 66, Session Laws of Alaska, 1949, is invalid as to all amounts above \$5.00 for each fisherman, so that the amounts paid the Tax Commissioner by plaintiff in 1949, 1950 and 1951, under duress, protest, compulsion and involuntarily, was \$45.00 for each of the 696 names listed on Exhibit "A" and mentioned in Paragraph V above, making the total sum of \$31,320.00.

#### VII.

That neither this sum of \$31,320.00 nor any part thereof was due the defendant upon the dates of payment or at any other time, for the reason that the law under which it was paid was invalid and void as to these payments.

## VIII.

That plaintiff has demanded a refund of the sum of \$31,320.00 from the defendant, together with interest thereon from the dates of the several payments made by it, as set forth in Exhibit "A" hereto, but the defendant has not paid any part thereof, and the sum of \$31,320.00, together with interest thereon at 6% per annum from the dates of the several payments thereof, is now due and owing from defendant to plaintiff.

## Second Cause of Action

As a second and alternative cause of action against defendant, plaintiff alleges:

## I.

Plaintiff re-alleges Paragraphs I, II, III, IV, and V of the First Cause of Action.

## II.

That Chapter 66, Session Laws of Alaska, 1949, levied a valid tax on fishermen in the employ of plaintiff for the years 1949, 1950 and 1951 of \$5.00 per annum for each fisherman employed, and plaintiff made to the defendant in those years an overpayment, or an amount in excess of the license fee due, on the 696 nonresident fishermen hereinabove referred to and whose names and places of employment are set forth in Exhibit "A" hereto, to which reference is hereby made; and this excess or overpayment was at the rate of \$45.00 per annum for each man, or a total of \$31,320.00, which sum was



paid through error and under compulsion and duress, and it was paid involuntarily.

### III.

That demand was made on March 18, 1952, on the defendant for repayment of the sum of \$31,320.00 to plaintiff, together with interest at the rate of 6% per annum from the dates of the several payments as shown on Exhibit "A" hereto. This demand was made in writing on the date aforesaid, but defendant has refused to pay any part thereof, and the sum aforesaid, to wit: \$31,320.00, with interest as alleged, is now due and owing plaintiff from defendant.

### Third Cause of Action

Plaintiff for a third and alternative cause of action against the defendant, alleges as follows:

#### I.

Plaintiff re-alleges all the allegations contained in Paragraphs I, II and III of its First Cause of Action.

#### II.

That defendant owes plaintiff the sum of \$31,320.00, together with interest at 6% per annum on \$3,960.00 from August 30, 1949; on \$1,395.00 from November 4, 1949; on \$1,530.00 from November 2, 1949; on \$3,375.00 from July 18, 1949; on \$360.00 from November 26, 1949; on \$810.00 from November 19, 1949; on \$855.00 from September 13, 1949; on \$3,375.00 from July 18, 1949; on \$360.00 on \$4,590.00 from June 24, 1950; on \$1,800.00 from

November 3, 1950; on \$3,825.00 from July 17, 1950; on \$540.00 from July 9, 1950; on \$1,350.00 from August 24, 1950; on \$855.00 from September 27, 1950; on \$855.00 from July 15, 1950; on \$1,575.00 from July 19, 1950; on \$720.00 from August 17, 1950; and on \$720.00 from June 26, 1951, all for money had and received from plaintiff.

#### Fourth Cause of Action

Plaintiff for a fourth and alternative cause of action against the defendant alleges as follows:

##### I.

Plaintiff re-alleges Paragraphs I, II, III, IV, V and VI of its First Cause of Action herein.

##### II.

That the license fees of \$50.00 each per annum mentioned in the First Cause of Action were purported to be levied on the individual nonresident fishermen in plaintiff's employ. That these fishermen were all employed under contracts with plaintiff, and in some of those contracts the plaintiff agreed and bound itself to the employees to assume the payment of all fishermen's license fees validly imposed by the laws of Alaska, and in others the contracts provided that the plaintiff should pay all such license fees and deduct the amount thereof from wages due the individual fishermen. That pursuant to the several different contracts, the plaintiff paid the defendant the full sum of \$34,800.00 during the years 1949, 1950 and 1951 as nonresident fisher-

men's license fees, which sum was paid under protest, duress, compulsion and involuntarily, and not otherwise, because of threats made by defendant and his deputies to invoke the criminal penalties of Chapter 66 imposed on plaintiff for having in its employ fishermen for whom the license tax was not paid. That the individual fishermen themselves refused to pay the tax.

### III.

That plaintiff has operated salmon canneries at the places hereinabove set forth in its First Cause of Action and at other places in the Territory of Alaska for many years, and it has been the custom of the defendant and his deputies and his predecessors and various treasurers and tax collectors of the Territory of Alaska, to make collection of all fishermen's license fees and various other fees imposed upon employees of plaintiff, through the plaintiff at its various canneries, and a cooperative agreement has been in existence between the plaintiff and the defendant and all tax collection agencies in the Territory for many years for the convenience of the defendant and his predecessors and all the various tax collecting agencies in the Territory, by which the license fees and taxes of all resident and nonresident fishermen in the employ of plaintiff have been paid by it directly to the taxing authorities of Alaska from the funds of plaintiff, by means of its own checks or drafts, and this has been for the purpose of facilitating the collection of the tax by the defendant and the various tax collection

agencies of the Territory, through the years, so as to more efficiently and effectively collect the tax with a minimum of expense and maximum collections. That pursuant to this custom, the plaintiff has always kept complete records of its employees who are subject to license taxes and fees, including all fishermen's license fees, which records have been at all times available to the defendant, his predecessors, his deputies and all tax collecting agencies of the Territory, and all returns and all payments have been for years made to the defendant, his deputies, predecessors and tax collecting agencies, in this manner and solely for the purpose of assisting the Territorial taxing authorities in the collection of the Territory's revenue.

#### IV.

That in January, 1949, the Legislature of the Territory of Alaska enacted Chapter 66, Session Laws of Alaska, 1949, imposing a tax of \$50.00 on nonresident fishermen and a tax of \$5.00 on resident fishermen, and plaintiff's employees refused to pay this tax, during the year 1949. That the law, Chapter 66, makes it unlawful for any person, association or corporation to have in its employ any fisherman who shall not have paid the license fee, and it provides a penalty of \$500.00 or not to exceed six months in jail for any violation of the Act, including the employment of fishermen for whom the license fee or tax has not been paid.

## V.

That in July, 1949, the defendant sent his deputy to the cannery of the plaintiff at Naknek, Alaska, and demanded from the plaintiff the payment of the \$50.00 license fee on each of its nonresident employees who were fishermen, and threatened criminal prosecutions against the plaintiff, and threatened to arrest plaintiff's officers and superintendents for having in its employ nonresident fishermen for whom the license fee had not been paid. Plaintiff at that time had expended more than \$1,300,000.00 in preparation for the fishing and canning season at its various plants, which seasons are of short duration, during which all fishing and canning must be done, and it was threatened with irreparable damage and injury if it continued to employ nonresident fishermen for whom the license fee had not been paid. Its only alternative was to either pay the tax immediately itself or discharge so many nonresident fishermen that it would disrupt and destroy plaintiff's fishing and canning operations and subject it to a heavy loss, and plaintiff was obliged to pay immediately to the defendant's deputy the tax on 60 nonresident employees at Naknek at the rate of \$50.00 each, and this was paid under compulsion, duress, threats of criminal prosecution, and in order to avoid heavy loss and damage to plaintiff and its property and to avoid imprisonment of its officers and superintendents; and this sum of \$3,000.00 was paid to the tax collector on July 16, 1949. That the total sum of \$34,800.00 paid as alleged in this com-

plaint, was paid by the plaintiff by means of its checks and from its own funds by agreement with the fishermen in its employ, as aforesaid, that the company would immediately bring suit in this court for the purpose of enjoining the defendant from collecting the nonresident fishermen's license tax, and, if successful, it would make restitution to the individual fishermen of that part of the fees which had been deducted from their wages.

## VI.

That set forth in Exhibit "A" hereto attached and made a part of this complaint and opposite the names of the individual fishermen thereon listed, is a checkmark showing in each case whether the license fee was deducted by plaintiff from wages due the employee-fisherman or assumed and paid by the plaintiff from its own funds, pursuant to its contracts with its employees. The list shows, and plaintiff alleges, that of the total amount of the overpayment of license fees in 1949, 1950 and 1951 in the total sum of \$31,320.00, which is the excess amount over and above the fee at \$5.00 per annum per man, the sum of \$21,780.00 was assumed and paid by the plaintiff from its own funds, and the sum of \$9,540.00 was paid by the plaintiff, as aforesaid, was deducted by it from the wages of the employees, and paid by the plaintiff under the agreement made between the plaintiff and its employees to vigorously prosecute application for its refund and to challenge the validity of Chapter 66 in the courts.

## VII.

That on August 5, 1949, plaintiff brought an action in the above-mentioned court against the defendant alleging the invalidity of Chapter 66, Session Laws of Alaska, 1949, and requesting an injunction against the defendant, his deputies, etc., enjoining them from collecting the tax on nonresident fishermen. Upon the institution of that suit, plaintiff obtained and filed a good and sufficient surety bond with the United States Fidelity & Guaranty Company, as surety thereon, in the sum of \$16,000.00 to indemnify the defendant and protect him for the entire year 1949 in the payment of all license fees due from the plaintiff or from all of its nonresident fishermen. This bond covered the fee, at \$50.00 each of all nonresident fishermen. That this was more than sufficient to cover all nonresident fishermen in the employ of plaintiff during that year and to fully protect the defendant in the payment of the nonresident fishermen's license fees, and the bond was a continuing bond conditioned to apply to the case until it should have been finally decided.

## VIII.

That this court denied the preliminary injunction by written opinion on August 15, 1949, and order was entered on August 17, 1949, but suggested orally and in the written opinion that defendant might, under the circumstances, consent to the issuance thereof; but the court said that since defendant did not see fit to do so, the court was powerless to

grant plaintiff the relief prayed for. At that time the bond was already on file to fully protect defendant from any and all loss which might arise through any delay and in the case the law should be held to be valid.

#### IX.

That on June 25, 1951, the United States Court of Appeals for the Ninth Circuit rendered an opinion holding the entire nonresident fishermen's license fee in excess of \$5.00 to be invalid and Chapter 66 of the Laws of 1949 to be void to that extent, and this opinion was affirmed by the United States Supreme Court on March 3, 1952.

#### X.

That on March 18, 1952, plaintiff made application in writing to the defendant for refund to it of the sum of \$31,320.00 aforesaid which was the amount of license fees paid by it in excess of the valid fee of \$5.00 per annum for each license, and it made application for interest on this excess amount of \$31,320.00 from the dates of the several payments until paid, but the defendant has refused to refund to the plaintiff any part thereof.

#### XI.

That the defendant is now threatening, on advice of counsel, that if any portion of the fees are to be refunded, the payments will be made to the individual fishermen regardless of whether the plaintiff paid the entire amount and regardless of whether the entire fee was paid by the plaintiff and not de-



ducted from wages of employees; and plaintiff verily believes and fears that if any portion of the fees are refunded, they will be paid, not to the plaintiff who paid them to the defendant, but to the fishermen, and this to plaintiff's damage and loss in the sum of \$21,780.00, with interest aforesaid.

## XII.

Plaintiff further alleges that as a taxpayer of the Territory of Alaska, it will be obliged to press its suit for recovery of all license fees paid by it from its own funds regardless of whether the defendant shall have made payment to individual fishermen-licensee in cases where they did not pay or assume any portion of the tax, and in that event plaintiff alleges that it is entitled to recover, and, therefore, by making payment to the individual fisherman who did not pay any portion of the license fees, the defendant will be subjecting the Territory and the taxpayers thereof to an unwarranted loss in whatever amount shall have been paid these individual nonresident fishermen directly in those cases where the plaintiff is also entitled to the repayment; and plaintiff verily believes that unless restrained and enjoined by this court, defendant may make payments to individual fishermen of amounts not due them, thereby subjecting the Territory and the taxpayers to a loss to that extent.

## XIII.

That the sum of \$3,000.00 is a reasonable attor-

ney's fee to be recovered from defendant for the prosecution of this suit.

Wherefore, plaintiff prays for judgment against defendant—

1. On either its First, Second or Third Causes of Action, in the sum of \$31,320.00, together with interest thereon at the rate of 6% per annum computed from the dates of the several payments as fully set forth in Paragraph II of the Third Cause of Action herein, until paid; or

2. On its Third Cause of Action in the sum of \$31,320.00, together with interest thereon as set forth in Paragraph II of its Third Cause of Action herein;

3. For plaintiff's costs and disbursements herein and an attorney's fee of \$3,000.00;

4. That the court issue to defendant forthwith a temporary restraining order restraining and enjoining him from making payments of any of the sums hereinabove referred to to any person or corporation other than plaintiff and an order to appear before the court to show cause, on a date to be fixed by the court, why a preliminary injunction should not be issued against defendant enjoining him from making payments of any of the sums mentioned in the First, Second, Third and Fourth Causes of Action herein, together with interest thereon, to any person or corporation other than plaintiff;

5. That plaintiff have such other and further relief as is meet in the premises.

PACIFIC AMERICAN  
FISHERIES, INC.,  
Plaintiff,

By /s/ H. L. FAULKNER,  
Its Agent and Attorney-  
in-Fact.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ H. L. FAULKNER,  
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed March 31, 1952.

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[Title of District Court and Cause.]

### MOTION TO DISMISS

Defendant moves the court to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted. The reasons are:

1. Plaintiff cannot invoke the provisions of §48-7-1 ACLA 1949 since plaintiff is neither the "taxpayer" within the meaning of that section nor the duly authorized representative of its fishermen employees upon whose behalf it purports to have instituted this action, and thus is not the "real

party in interest" within the meaning of Rule 17, Federal Rules of Civil Procedure; and

2. Plaintiff cannot recover independently of §48-7-1 ACLA 1949 since the Territorial Legislature, in enacting that statute, has substituted an exclusive remedy against the Territory for any remedy that may have existed at common law against the defendant Tax Commissioner for the recovery of taxes paid under an invalid law.

Dated at Juneau, Alaska, this 18th day of April, 1952.

/s/ J. GERALD WILLIAMS,  
Attorney General of Alaska;

/s/ JOHN H. DIMOND,  
Assistant Attorney General,  
Attorneys for Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed April 19, 1952.

In the District Court for the Territory of Alaska  
Division Number One, at Juneau

No. 6621-A

PACIFIC AMERICAN FISHERIES, INC.,  
Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,  
Defendant.

OPINION

Filed July 12, 1952

H. L. Faulkner, of Faulkner, Banfield & Boochever, attorneys for plaintiff.

J. Gerald Williams, Attorney General of Alaska, and John Dimond, Assistant Attorney General, attorneys for defendant.

Plaintiff seeks recovery of monies paid to the Territory as license fees for nonresident fishermen. The license statute, Chapter 66 SLA 1949, in addition to placing taxes of \$50 on nonresident fishermen and \$5 on resident fishermen, made it unlawful for anyone to employ an unlicensed fisherman.

For administrative convenience fees were collected by the employers from the nonresidents so that the agents of the Territory could receive them at certain collection places rather than pursue fishermen over the Territory. In 1949, 1950 and 1951 some nonresident fishermen refused to obtain licenses. Since it was unlawful for plaintiff to continue to employ them unlicensed, it advanced the

amounts from its own funds, partially reimbursing itself by making deductions from the wages of some of the individual fishermen.

The statute, so far as taxing nonresidents in excess of \$5, was held unconstitutional, *Mullaney vs. Anderson*, 342 U. S. 415, and it is this excess which plaintiff seeks to recover.

Plaintiff sues in its own right, and not as assignee of the fishermen. Defendant moves to dismiss for failure to state a claim on the grounds that plaintiff does not qualify under the tax refund statutes, and that the statutory remedy is exclusive. The complaint consists of two statutory counts, a common count for money had and received, and a fourth count seeking injunctive relief.

I am of the opinion that the complaint does not state grounds for equitable relief.

The hiring of unlicensed fishermen derogates from whatever standing in equity may be claimed for the plaintiff, and the argument that, if the defendant is allowed to make refund to the fishermen and the Court finds that a return must also be made to plaintiff, double payment and added expense to the Territory will be the consequences, which in turn will increase plaintiff's taxes, to its irreparable damage, is clearly insufficient.

Plaintiff also asserts that, if there is no remedy at law, equity should act. But this maxim presupposes a remedy which is inadequate and may not be invoked when there is in fact no remedy at law.

The statutory counts under Section 48-7-1 (a) and (b), *ACLA 1949*, turn largely on legislative in-

tent. Defendant contends that the definition should be "the person chargeable with the tax" or "the person owning property subject to the tax" and would probably also add that such person must have actually paid the tax itself. Plaintiff urges that the word should be defined simply as "the person who paid the tax."

The section cited has not been the subject of judicial decision, but it appears that the legislature had defendant's definitions in mind. When the tax is on property, a person paying the tax, who has some interest in the property, may recover. The cases cited by plaintiff deal with taxes levied against the payor or against property in which the payor had an interest. Some of them deal with a "statutory taxpaying representative" who is also allowed to recover. None of the cases fits the present situation. The excise here under consideration is a license, assessed against a person, not against property. Plaintiff has paid the personal tax of another, and the statutory remedies do not provide for this situation. *Pacific American Fisheries vs. Mullaney*, 191 F. (2d) 137, 140-1.

The real party in interest is the party who, by the substantive law of the forum, has the right sought to be enforced. Since under the statute the right is in the taxpayer, plaintiff cannot qualify as the real party in interest. It is to be noted that plaintiff is attempting to sue in its own right, and not as assignee for the fishermen. Although plaintiff attempts to place itself under the express trust provisions of Rule 17 (a) of the Federal Rules of

Civil Procedure so as to qualify as a real party in interest, it is clear that no trusts were formed between plaintiff and the fishermen, nor was there any intention to form such a relationship. Therefore, plaintiff does not qualify as a person suing in the place of the "taxpayer" who is given a remedy by the statute. Clark on Code Pleading, 2d Ed., Secs. 22 and 27; 2 Federal Practice and Procedure (Barron and Holtzoff), Sec. 482; 3 Moore's Federal Practice, Sec. 17.07.

The second count, under Section 48-7-1 (b) ACLA 1949 fails for the same reason set forth above, in that it contemplates an action by a taxpayer, and, since plaintiff is not the taxpayer, it is not the real party in interest, nor given a right by the statute. Moreover, this part of the statute was not designed to cover plaintiff's situation. "(T)hrough error, or otherwise" envisions an unconscious overpayment which was not known by the taxpayer to be incorrect at the time of making the return. Clerical error is indicated by the provision that the tax commissioner "on audit of the account" should make a refund. Implicit in this subdivision is the idea that the tax imposed was valid and has remained unchanged, but that the taxpayer, by the terms of the tax statute at the time of payment, has remitted too much.

The third count is a common law count for money had and received. Defendant contends that this will not lie because the statutory remedy is exclusive. At common law, a taxpayer had an action in the nature of assumpsit whenever taxes were paid under duress and coercion, and they were wrongfully assessed.



Section 48-7-1 (a) provides for refund of taxes paid under protest. At common law, no such refund could be secured on the basis of a mere protest. Section 48-7-1 (b) provides for return of overpayments, and does not even require a protest, let alone duress. At common law, no recovery was allowed in this situation either. Therefore, it would appear that two new means of recovery have been created, and, since the common law action, requiring protest, wrongful assessment and duress, is not mentioned, it is apparent that the statutory forms are in addition to the one already in existence. It would seem that the statutes were intended to liberalize recoveries by creating rights where formerly none existed. The statutes may well be exclusive as to the situations covered by them, but, since they do not cover the duress situation, an action based on duress will still lie.

Even though an action will still lie outside the statutes, its requisites are not fulfilled by the allegations in the third count. Payment under protest, duress and an invalid assessment are not alleged. Since it is insufficient on these grounds, it is unnecessary to determine whether or not plaintiff is the real party in interest as to that part of the claim which was deducted from the fishermen's wages.

The motion to dismiss is, therefore, granted. Plaintiff is allowed ten days in which to amend.

/s/ GEORGE W. FOLTA,

Judge.

[Endorsed]: Filed July 12, 1952.

[Title of District Court and Cause.]

### ORDER

This cause came on for hearing before the court on May 2, 1952, on defendant's motion to dismiss duly served and filed herein. Whereupon, after hearing arguments of counsel for the respective parties, after due consideration of the files and records in this case and the briefs filed herein, and the court being fully advised in the premises, it is hereby

Ordered, that plaintiff's complaint be, and it hereby is dismissed, and plaintiff is allowed ten days in which to amend.

Done in open court at Juneau, Alaska, this 17th day of July, 1952.

/s/ GEORGE W. FOLTA,  
District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed July 17, 1952.

[Title of District Court and Cause.]

## AMENDED COMPLAINT

Plaintiff complains and alleges of defendant and prays as follows:

### I.

That plaintiff is a corporation organized under the laws of Delaware and qualified to do business in the Territory of Alaska, and it has paid all its corporation license fees due the Territory and complied with all laws relating to foreign corporations doing business therein, and it operates salmon canneries at Alitak, Kasaan, King Cove, Naknek, Nushagak, Petersburg, Port Moller, Shumagin and Excursion Inlet and on the floating cannery known as Floater #1; and it operated at all of these places during the years 1949 and 1950 except Excursion Inlet and Floater #1 which were operated in 1950 and 1951.

### II.

That plaintiff is a taxpayer within the Territory of Alaska and it pays annually large sums in taxes and license fees to the Territory, and various other taxes, including taxes on real property in certain municipalities and school districts of the Territory, and it has been such taxpayer for many years prior to the date of this complaint.

### III.

That the defendant M. P. Mullaney is the duly appointed and acting Commissioner of Taxation for

the Territory of Alaska, and he was such at all times mentioned herein.

#### IV.

That plaintiff employs a large number of fishermen in the operation of its salmon canneries each year, and it did employ a large number of both resident and nonresident fishermen in its operations during the years 1949, 1950 and 1951, and it paid the defendant, as a license tax under the provisions of Chapter 66, Session Laws of Alaska, 1949, \$50.00 for each nonresident fisherman in its employ for each year he was employed by the company, to wit: 1949, 1950 and 1951, paying a total of 695 separate fees of \$50.00 each during those three years, which amounted to the sum of \$34,750.00.

#### V.

That in January, 1949, the Legislature of the Territory of Alaska enacted Chapter 66, Session Laws of Alaska, 1949, imposing a tax of \$50.00 on nonresident fishermen and a tax of \$5.00 on resident fishermen, and plaintiff's employees refused to pay this tax, during the year 1949. That the law, Chapter 66, makes it unlawful for any person, association or corporation to have in its employ any fisherman who shall not have paid the license fee, and it provides a penalty of \$500.00 or not to exceed six months in jail for any violation of the Act, including the employment of fishermen for whom the license fee or tax has not been paid.

## VI.

That this sum of \$34,750.00 was paid the defendant Commissioner of Taxation in 1949, 1950 and 1951, under duress, compulsion and protest and not voluntarily, and in order to avoid criminal penalties imposed on the plaintiff under the provisions of Chapter 66 and in order to avoid irreparable loss of plaintiff's property. That attached hereto and made a part of this complaint as though fully set forth in this paragraph is a list of all nonresident fishermen employees of plaintiff for whom plaintiff paid the license fees, and the list sets forth the salmon canneries where these employees were employed, the dates of payment of the license fees in each case, the number of the check or draft by which paid, together with a summary or recapitulation of the names, dates, payments, etc., and which list and summary are marked Exhibit "A" and prayed to be read as a part of this paragraph as though fully set forth herein.

## VII.

That the tax or license fee levied by the provisions of Chapter 66, Session Laws of Alaska, 1949, is invalid as to all amounts above \$5.00 for each fisherman, so that the amounts paid the Tax Commissioner by plaintiff in 1949, 1950 and 1951, under duress, protest, compulsion and involuntarily, and under an invalid assessment, was \$45.00 for each of the 695 names listed on Exhibit "A" and mentioned in Paragraph VI above, making a total sum of \$31,275.

## VIII.

That neither this sum of \$31,275.00 nor any part thereof was due the defendant upon the dates of payment or at any other time, for the reason that the law under which it was paid was invalid and void as to these payments.

## IX.

That set forth in Exhibit "A" hereto attached and made a part of this complaint and opposite the names of the individual fishermen thereon listed, is a checkmark showing in each case whether the license fee was deducted by plaintiff from wages due the employee-fisherman or assumed and paid by the plaintiff from its own funds, pursuant to its contracts with its employees. The list shows, and plaintiff alleges, that of the total amount of the overpayment of license fees in 1949, 1950 and 1951 in the total sum of \$30,105.00, which is the excess amount over and above the fee \$5.00 per annum per man, the sum of \$20,610.00 was assumed and paid by the plaintiff from its own funds, and the sum of \$9,495.00 was paid by the plaintiff, as aforesaid, was deducted by it from wages of the employees, and paid by the plaintiff under the agreement made between the plaintiff and its employees to vigorously prosecute application for its refund and to challenge the validity of Chapter 66 in the courts.

## X.

That the license fees of \$50.00 each per annum mentioned in the fourth paragraph above were purported to be levied on the individual nonresident fisherman in plaintiff's employ. That these fisher-

men were all employed under contracts with plaintiff, and in some of those contracts the plaintiff agreed and bound itself to the employees to assume the payment of all fishermen's license fees validly imposed by the laws of Alaska, and in others the contracts provided that the plaintiff should pay all such license fees and deduct the amount thereof from wages due the individual fishermen. That, pursuant to the several different contracts, the plaintiff paid the defendant the full sum of \$34,750.00 during the years 1949, 1950 and 1951 as nonresident fishermen's license fees, which sum was paid under protest, duress, compulsion, involuntarily, and under a void and invalid assessment, and not otherwise, because of threats made by defendant and his deputies to invoke the criminal penalties of Chapter 66 imposed on plaintiff for having in its employ fishermen for whom the license tax was not paid. That the individual fishermen themselves refused to pay the tax.

## XI.

That defendant owes plaintiff the sum of \$30,105.00, together with interest at 6% per annum on \$3,915.00 from August 30, 1949; on \$1,395.00 from November 4, 1949; on \$1,530.00 from November 2, 1949; on \$3,375.00 from July 18, 1949; on \$360.00 from November 26, 1949; on \$810.00 from November 19, 1949; on \$855.00 from September 13, 1949; on \$2,205.00 from September 2, 1949; and on \$4,590.00 from June 24, 1950; on \$1,800.00 from November 3, 1950; on \$3,825.00 from July 17, 1950; on \$540.00 from July 9, 1950; on \$1,350.00 from August 24,

1950; on \$855.00 from September 27, 1950; on \$855.00 from July 15, 1950; on \$405.00 from July 19, 1950; on \$720.00 from August 17, 1950; and on \$720.00 from June 26, 1951, all for money had and received from plaintiff, which was paid defendant under duress, protest, compulsion, involuntarily, and under a void assessment.

## XII.

That the sum of \$3,000.00 is a reasonable attorney's fee to be recovered from defendant for the prosecution of this suit.

Wherefore, plaintiff prays for judgment against defendant—

1. In the sum of \$30,105.00, together with interest thereon at the rate of 6% per annum computed from the dates of the several payments, as fully set forth in Paragraph XI herein, until paid;

2. For plaintiff's costs and disbursements herein and an attorney's fee of \$3,000.00.

PACIFIC AMERICAN  
FISHERIES, INC,

Plaintiff,

By /s/ H. L. FAULKNER,  
Its Agent and  
Attorney-in-Fact.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ H. L. FAULKNER,  
Attorneys for Plaintiff.



Pacific American Fisheries, Inc.

Recapitulation of Non-Resident Fishing Licenses Paid for at \$50.00  
Each on Which \$45.00 Each Is Claimed for Refund

Cannery	Date	Draft No.	No. of Licenses	Amount paid at \$50 ea.	Amount would be at \$5 ea.	Claim for Refund	Payment Absorbed by Company	Payment Absorbed by Individual
Alitak	8-30-49	41732	88	\$ 4,400	\$ 440	\$ 3,960	\$ 1,710	\$2,250
	6-24-50	44087	102	5,100	510	4,590	2,160	2,430
Kasaan	11- 4-49	104	31	1,550	155	1,395	1,395	.....
	11- 3-50	136	40	2,000	200	1,800	1,800	.....
King Cove	11- 2-49	45433	34	1,700	170	1,530	1,485	45
	7-17-50	48379	85	4,250	425	3,825	3,645	180
Naknek	7-16-49	45774	60	2,955	300	2,655	.....	2,700
	7-18-49	45776	15	750	75	675	.....	675
Nushagak	11-26-49	46842	8	400	40	360	.....	360
	7- 9-50	49352	12	600	60	540	.....	540
Petersburg	11-19-49	47318	18	900	90	810	810	.....
	8-14-50	50048	29	1,450	145	1,305	1,305	.....
	8-24-50	7911 (ek.)	1	50	5	45	45	.....
Port Moller	9-13-49	47525	19	950	95	855	765	90
	9-27-50	50603	19	950	95	855	585	270
Shumagin	9- 2-49	48893	49	2,450	245	2,205	2,205	.....
	7-15-50	50830	19	950	95	855	855	.....
Floater #1	7-19-50	51782	35	1,750	175	405	405	.....
	6-26-51	51302	16	800	80	720	720	.....
Ex-Inlet	8-17-50	50057	16	800	80	720	720	.....
			<u>696</u>	<u>\$34,800</u>	<u>\$3,480</u>	<u>\$30,105</u>	<u>\$20,610</u>	<u>\$9,495</u>
			Totals					

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 15, 1952.

[Title of District Court and Cause.]

### ANSWER

Defendant answers plaintiff's Amended Complaint as follows:

#### First Defense

1. Defendant admits the allegations in Paragraph I.

2. Answering Paragraph II, defendant admits that "plaintiff is a taxpayer within the Territory of Alaska," but with respect to the remaining allegations, defendant is without knowledge or information sufficient to form a belief as to the truth thereof, and, therefore, denies the same.

3. Defendant admits the allegations in Paragraph III.

4. Defendant admits the allegations in Paragraph IV.

5. Answering Paragraph V, defendant admits the allegations contained therein with the exception of the allegation that "plaintiff's employees refused to pay this tax, during the year 1949." Defendant denies this allegation because it is too general—the actual facts, defendant alleges, were these: Some of plaintiff's employees in 1949 at first refused to pay their license fees, but after discussion with defendant's deputies, they later agreed to and did pay such fees.

6. Answering Paragraph VI, defendant admits

all allegations with the exception of that contained in the first sentence thereof. With respect to such allegation, defendant alleges that the duplicate receipts, or licenses, of approximately 212 of the persons listed in plaintiff's Exhibit "A" were stamped "Paid Under Protest," but that none of the \$34,750.00 which plaintiff alleges it has paid defendant was paid involuntarily by plaintiff or by reason of any duress or compulsion exercised by defendant or any of his deputies.

7. Answering Paragraph VII, defendant admits the allegations therein with the exception of the allegation that the amounts paid the Tax Commissioner were paid "under duress, protest, compulsion and involuntarily."

8. Answering Paragraph VIII, defendant admits the allegations therein with the exception of the allegation that the amounts paid defendant were not due on the dates of payment.

9. Answering Paragraph IX, defendant admits the allegations therein with the exception of those allegations pertaining to certain contracts and agreements between plaintiff and its employees. Defendant denies these allegations since he is without knowledge or information of such contracts or agreements sufficient to form a belief as to the truth of the allegations relating thereto.

10. Answering Paragraph X—

(a) Defendant admits that license fees of \$50.00 each per annum mentioned in the fourth paragraph

of plaintiff's amended complaint were not only purported to be levied but were levied and imposed upon the individual nonresident fishermen in plaintiff's employ;

(b) Defendant denies the allegations pertaining to contracts between plaintiff and its employees contained in the second and third sentences of Paragraph X for the reason that defendant is without knowledge or information of such contracts sufficient to form a belief as to the truth of the allegations relating thereto;

(c) Defendant admits that he received from plaintiff the sum of \$34,750.00 during the years 1949, 1950 and 1951 as nonresident fishermen license fees;

(d) With respect to the allegation that this "sum was paid under protest, duress, compulsion, involuntarily \* \* \* and not otherwise," defendant alleges that the duplicate receipts, or licenses, of approximately 212 of the persons listed in plaintiff's Exhibit "A" and from whom deductions for license taxes were made, were stamped "Paid under Protest," but defendant denies that these amounts were paid involuntarily or under protest by plaintiff or by reason of any duress or compulsion exercised by defendant or any of his deputies, and defendant alleges that at no time was any duress or compulsion exerted upon plaintiff by defendant or any of his deputies;

(e) Defendant denies that any threats were ever made by him against plaintiff to invoke the criminal penalties of Chapter 66 imposed upon plaintiff for

having in its employ fishermen for whom the license tax was not paid, and, on information and belief, defendant denies that any such threats were ever made by any of defendant's deputies;

(f) Defendant denies the allegation that "the individual fishermen themselves refused to pay the tax" because this allegation is too general—the actual facts, defendant alleges, were these: Some of plaintiff's employees in 1949 at first refused to pay their license fees, but after discussion with defendant's deputy they later agreed to and did pay such fees.

11. Defendant denies the allegations in Paragraph XI.

12. Defendant denies the allegations in Paragraph XII.

#### Second Defense

With respect to the amounts that plaintiff alleges it has deducted from the wages of its fishermen employees, the amended complaint fails to state a claim against defendant upon which relief can be granted because plaintiff is not the owner of those claims sued upon, but such claims belong to those persons listed in plaintiff's Exhibit "A" from whom such deductions were made, and plaintiff is neither the agent nor the representative, nor in any way authorized to present such claims to this court, and is thus not the real party in interest within the meaning of Rule 17, Federal Rules of Civil Procedure.

## Third Defense

Even if plaintiff had some interest in this litigation sufficient to allow it to be a real party in interest with respect to the amounts that plaintiff alleges it has deducted from the wages of its fishermen employees, those persons named in plaintiff's Exhibit "A" from whom such deductions were made are indispensable parties to this action and have not been made parties. The reasons that they are indispensable parties are these: (1) the face of the amended complaint shows that these persons paid the taxes themselves and that they and not plaintiff are thus entitled to refunds, if any, that the defendant may be obliged to make; and (2) such claims for refunds have not been assigned to plaintiff.

## Fourth Defense

The amended complaint fails to state a claim against defendant upon which relief can be granted as far as plaintiff's prayer for costs is concerned, because this suit, in practical effect, is one against the Territory of Alaska in its sovereign capacity, the Territory is not liable for costs unless specifically made so by some provision of statute, and no such statute exists.

Wherefore, defendant prays for judgment as follows:

1. That this action be dismissed;
2. That defendant have his costs incurred herein; and

3. That defendant be allowed a reasonable attorney's fee.

/s/ J. GERALD WILLIAMS,  
Attorney General of Alaska.

/s/ JOHN H. DIMOND,  
Assistant Attorney General,  
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed July 18, 1952.

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[Title of District Court and Cause.]

#### AMENDMENT TO ANSWER

Defendant amends by interlineation his answer filed herein in the following particulars, to wit:

By striking the words: “ \* \* \* and, on information and belief, defendant denies that any such threats were ever made by any of defendant's deputies,” contained in sub-paragraph (e) of paragraph 10, and by substituting therefor the following:

“ \* \* \* but defendant admits that on not more than two occasions such threats were made by one of defendant's deputies.”

/s/ J. GERALD WILLIAMS,  
Attorney General of Alaska,

/s/ JOHN H. DIMOND,  
Assistant Attorney General,  
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed July 23, 1952.

[Title of District Court and Cause.]

## OPINION

Filed November 10, 1952

In *Mullaney vs. Anderson*, 342, U.S. 415, Chap. 66 S.L.A. 1949, imposing a license tax of \$50 on non-resident fishermen as against \$5 on resident fishermen, was held unconstitutional as to the excess of \$45. By this action the plaintiff seeks a refund of \$30,105 in license fees paid by it for the years 1949, 1950 and 1951 for and on behalf of the non-resident fishermen employed by it as well as those from whom it merely bought fish.

The first complaint in this action was held insufficient, *Pacific American Fisheries, Inc. vs. Mullaney*, 105 Fed. Supp. 907, but the plaintiff was allowed to amend its complaint to allege that the assessment of the tax was wrongful and that payment thereof was made under protest and duress—the essentials of a claim for refund under the common law. The amended complaint alleges the payment by plaintiff of \$20,610 from its own funds pursuant to a provision of its contract with the fishermen requiring it to pay the license taxes, and \$9,495 from funds derived by way of deductions from the earnings of the fishermen and the wages of other employees who are included within the statutory definition of “fisherman”; that the tax was wrongfully assessed and that the payments referred to were made under protest and duress.

The plaintiff operates canneries in various sections of the Territory and is compelled to import the bulk of its employees each season from the



states because local fishermen are not available in sufficient numbers. For the mutual convenience of the Territory and the salmon packers, including the plaintiff, it has been their practice to remit by their own checks the license tax fees due from its fishermen.

The act became effective March 21, 1949. So far as pertinent to this controversy, it provides that:

“It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. \* \* \*

“\* \* \* Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding \$500 or imprisonment not to exceed six months, or to both such fine and imprisonment.”

The non-resident fishermen effectively shifted the burden of this tax to the plaintiff by means of the following provision in their employment contracts:

“Territorial fishing licenses, when required, shall be paid by the Company for men covered by this agreement who work exclusively for the Company.”

This provision was in effect during the entire period of this controversy. Some of the contracts allowed the employer to deduct the license fees

from the wages or earnings of the fishermen. Obviously, in these instances the plaintiff was a mere agent for the remission of the money, with no right to claim a refund.

Plaintiff argues, however, that it has an "understanding" or "agreement" with the fishermen to recover for them that part of the payments which it deducted from their wages. This is wholly insufficient in the absence of an assignment. As to the payments made under the quoted provision, the plaintiff claims it is entitled to a refund in its own right.

Before the opening day of the fishing season in 1949 most of the fishermen employed under the contract had signed license applications and delivered them to the plaintiff in accordance with the practice referred to. Plaintiff, however, began operations without having paid the license fees. When the tax collector visited its Naknek plant on July 6, 1949, and requested payment, there was some reluctance or unwillingness to pay because the plaintiff and the fishermen were of the opinion that the tax was invalid. Thereupon the tax collector warned the plaintiff's officers and fishermen that they were subject to arrest and prosecution, the former for employing unlicensed fishermen and the latter for not paying the tax. But it should be pointed out in this connection that not only was the collector not empowered to make arrests but that no formal complaint was ever lodged with any magistrate charging the plaintiff or any of its officers with a violation of the Act. On a subsequent

call at the plant on July 16, the applications were turned over to him and thereafter the fees were paid by the plaintiff as stated. Protest was made at the time some of the payments were made, and some of the applications and licenses bear the notation that the fee was paid under protest. At that time the plaintiff was engaged in the prosecution of a suit to have the tax declared invalid, and points to this as further proof of protest.

The instant action is in the nature of a test case, with a relatively small amount of the total sum collected under the statute at stake. The defendant, conceding it has no right to retain the money, asserts that its only interest is to protect itself from future liability on the same claims.

In essence the plaintiff's claim rests on the fact that it actually delivered the monies to the Territory, and that by reason of the peculiar circumstances under which this industry operates, its labor relations, and the terms of the statute, it was forced to make the payment and bear the burden of the tax. It contends that the collector demanded that it pay the tax and that, therefore, it was compelled to pay to avoid the penalties of the act and the disruption of its business, and in support thereof argues that the provisions of the act are self-executing and that since the Act was declared unconstitutional, the assessment of the tax was invalid.

Defendant contends that the plaintiff is not the real party in interest, that the fishermen are indispensable parties, that the acts of the collector were not such as to support a finding of duress, and that

the protest was insufficient. It is unnecessary to consider all of these contentions, in view of the conclusions reached.

The principal question is whether payment of the tax was made under duress, coercion and an invalid assessment. Correlative questions, important only if an affirmative answer is given to the foregoing question, are whether, as to the taxes paid pursuant to plaintiff's contract with the fishermen, the fishermen are indispensable parties; and whether, as to the taxes deducted from the pay and earnings of the fishermen, the plaintiff is the real party in interest.

So far as plaintiff's claim rests on its making the actual delivery of the monies there is no dispute. The established practice of paying the tax to the Territory had been adopted from considerations of mutual benefit and convenience, such as economy in collection and avoidance of interruptions with plaintiff's fishing and other operations. This procedure was followed here, although it was not required by statute.

Irrespective of this procedure and the practical assumption of the tax by the plaintiff under its labor contracts, the incidence of the tax remains on the fishermen. As between the plaintiff and its fishermen, the only effect of the contract provision is to augment their compensation. If compensation in this form fails because of the invalidity of the tax, it is the fishermen who are entitled to a refund. Economically, the diffusion theory of tax incidence makes plaintiff's claim of carrying the

burden of the tax rather dubious. *New Consumers Bread Co. vs. Commissioner*, 115 Fed. (2) 162. The real dispute arises over the reasons why plaintiff made the actual delivery. Plaintiff claims that because the statute made it unlawful to employ unlicensed fishermen, and because the fishermen refused to pay for the licenses themselves, it was forced to pay in order to protect its investment and continue its business. But the statute did not require the plaintiff to pay the tax. It is not directed in terms or in practical operation against employers. The tax collector was familiar with the provisions of the act and the practice referred to when he called at plaintiff's plant. It is abundantly clear that his request for payment was made pursuant to the established practice and not for any notions of liability of the plaintiff. Equally unavailing is the contention that the provisions of the act are self-executing. It may be that they are of such character in the sense that they require no complementary legislation to make them effectual or operative. But they are not self-executing as that term is used in the law of duress because the act is devoid of any provision authorizing summary seizure, distraint or forfeiture of property, franchise, the right to sue, or providing for the immediate accrual or acceleration of penalties or interest. *Gaar, Scott & Co. vs. Shannon*, 223 U.S. 468, 471. The penalties of the statute may be invoked only upon the doing of affirmative acts and after according the one charged a reasonable opportunity to challenge its validity in the traditional fashion.

Thus it would appear that the statute alone did

not compel plaintiff to make this payment; but it may well be that the sanctions of the statute, in conjunction with plaintiff's contractual obligation, left it no alternative, for it could not have compelled the fishermen to pay the tax without breaching its contracts and risking a labor dispute. It could not have discharged all of its unlicensed employees because they were irreplaceable, at least during the season of 1949. It could not have continued in its employment, or bought fish from, unlicensed fishermen without risking prosecution. Ceasing operations would have resulted in the loss of its investment. Under these circumstances, plaintiff asserts that to characterize the payment as "voluntary" is not realistic. It would, therefore, appear that the plaintiff's contention that payment was made under duress is reducible to the proposition that irrespective of the absence of at least some of the elements of duress, the situation which confronted it in July, 1949, was so fraught with risk of pecuniary loss that the request of the collector was itself sufficient to transform the situation into one of duress. In answering this contention, it may not be amiss to make some observation on the nature of duress as that term is used in tax law.

It has been pointed out that tax refunds are a matter of governmental grace, *New Consumers Bread Co. v. Commissioner*, *supra*. Nevertheless where the payment is made involuntarily, it may be recovered. In recent decisions, the courts have been more indulgent toward the degree and type of compulsion required to render a payment involuntary,

Parsons vs. Anglim, 143 Fed. (2) 534. Here it appears that if any improper influence was exerted upon the plaintiff, it is traceable to the bargaining power of the fisherman rather than to the statute or the request of the collector. Extensive research has not revealed any decision allowing recovery where the force, duress, or coercion was not the product of governmental action, but rather the result of the actions of independent parties, *Brumagim vs. Tillin-ghast*, 18 Cal. 265; 79 Am. Dec. 176 Anno. 64 A.L.R. 51. The usual definitions of compulsion, resulting from demand and seizure or threatened seizure of the taxpayer's person or property, are not apposite because here the tax was not placed by statute upon the plaintiff. It should be pointed out here that "demand" in tax law is a term of art. In the legal sense a demand may be made only upon the one who by express provisions of the statute is made liable for the tax. The request of the tax collector, therefore, did not constitute a demand and hence there could have been no seizure of plaintiff's officers or its property for nonpayment of the tax imposed on its fishermen, from which it follows that an essential element of duress, that of demand, is entirely lacking. Nor was any threat of seizure made. *Atchison, etc., Ry. Co. vs. O'Connor*, 223 U.S. 280; *Gaar, Scott & Co. vs. Shannon*, *supra*, and the annotations at 64 A.L.R. 9, 84 A.L.R. 294, 48 A.L.R. 1381, 74 A.L.R. 1301. Enforcement of the penalties for hiring unlicensed fishermen could not effect the collection of the tax from plaintiff. While the tax was on the fishermen employed by plaintiff, the individual fisher-

men cannot be considered "property" of the plaintiff so that it could be said that payment was in effect made to protect plaintiff's interest in them, as is often the case where real property is concerned.

The authorities cited by plaintiff are inapposite because in each there was an actual or anticipated demand made by the government upon the person who paid the money, *Parsons vs. Anglim*, supra; *White vs. Hopkins*, 51 Fed.(2) 159; *Ward vs. Bd. of Co. Comm.*, 253 U.S. 17; *Smart vs. United States*, 21 Fed. (2) 188; and upon whom the statute placed the tax. *Security Nat'l Bank vs. Young*, 55 Fed (2) 616; *Ratterman vs. Am. Exp. Co.*, 49 Ohio St. 608, 32 N.E. 754; *City of Franklin vs. Coleman Bros.*, 152 Fed. (2) 527; *Atchison, etc., Ry. Co. vs. O'Connor*, supra; *Ward vs. Bd. of Co. Comm.*, supra. These crucial elements are lacking here. Moreover, in the cases cited the payer delivered the money pursuant to actual or anticipated demand, under duress of the execution or threatened execution of the tax collection remedies and penalties designed to operate against the person or property of the payer. Not only was no demand made here, but there was no threat to invoke or pursue any remedy for the collection of the tax from the person or property of plaintiff. It would appear, therefore, that the plaintiff paid the tax of another without demand and without being compelled by law to do so.

Some of the cases cited by the plaintiff deal with situations where the tax was on property in which the payer had an interest, *McFarland vs. Cent. Nat'l Bank*, 26 Fed. (2) 890; *Smart vs. United States*, supra; *City of Franklin vs. Coleman Bros.*, supra;



Pederson vs. Stanley Co. 34 S.D. 560, 149 N.W. 522; Carpenter vs. Shaw, 280 U.S. 363; or the refund was allowed under statutory provisions liberalizing recoveries, Parsons vs. Anglim, *supra*, and hence are readily distinguishable from the instant case. Moreover, in none of the cases cited was the money delivered pursuant to a contract with the person who was supposed to pay the tax, as was done in the case at bar. Thus the decisions cited by the plaintiff offer neither precedent nor analogy for recovery here.

An additional ground for denying recovery is that the right to a refund belongs to the fishermen. The fifty-dollar license purchased for them by the company was additional compensation for their services, the essential nature of which was not affected by the circumstance that it was paid to the Territory in satisfaction of their tax liability. The fishermen are entitled to the benefit of their agreement whether it takes the form of a refund or a license; and since the contracts are negotiated before each fishing season, it would seem that payment of the fifty-dollar fee must have been within the contemplation of the parties irrespective of its validity.

For the reasons stated, I conclude that the payments were not made under duress imposed by the defendant and that the plaintiff is not the real party in interest. Accordingly, the plaintiff is not entitled to recover.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed November 10, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on for trial before the court on September 23, 1952, on plaintiff's amended complaint and the answer and amendment thereto of defendant to plaintiff's amended complaint. Plaintiff was represented by H. L. Faulkner of Faulkner Banfield and Boochever of Juneau, Alaska; defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence was adduced before the court on behalf of plaintiff and defendant, arguments were made and briefs filed by counsel for plaintiff and defendant, and the cause was submitted for judgment on September 23, 1952. On November 10, 1952, the court rendered its written opinion, which was on that day filed with the clerk of court. The court now makes the following:

Findings of Fact.

1. Plaintiff is a corporation organized under the laws of Delaware and qualified to do business in the Territory of Alaska, and it has paid all its corporation license fees due the Territory and complied with all laws relating to foreign corporations doing business therein, and it operates salmon canneries at Alitak, Kasaan, King Cove, Naknek, Nushagak, Petersburg, Port Moller, Shumagin and Excursion Inlet and on the floating cannery known as Floater

#1; and it operated at all of these places during the years 1949 and 1950 except Excursion Inlet and Floater # 1 which were operated in 1950 and 1951.

The defendant M. P. Mullaney is the duly appointed and acting Commissioner of Taxation for the Territory of Alaska, and he was such at all times mentioned herein.

2. This is an action to recover from defendant the sum of \$30,105.00 in license taxes imposed under the provisions of Chapter 66, Session Laws of Alaska, 1949, and paid by plaintiff for the years 1949, 1950 and 1951 for and on behalf of 669 non-resident fishermen employed by plaintiff. The basis for this action is a contention that the taxes were wrongfully assessed, and that the payments thereof were made under protest and duress. Of the total amount for which a refund is sought, \$20,610.00 represents money paid by plaintiff from its own funds pursuant to a provision in its employment contracts with certain of its fishermen employees requiring it to pay such license taxes, and \$9,495.00 represents money paid by plaintiff by way of deductions from the wages of other of its fishermen employees, pursuant to contracts with such fishermen.

3. For the mutual convenience of plaintiff and defendant, it had been the established practice (a) for plaintiff's fishermen employees, before the opening of the fishing season each year, to fill out and sign applications for the licenses required under Chapter 66, Session Laws of Alaska, 1949, and

leave such applications in the custody of plaintiff's officers; (b) for defendant's deputy to then call at the cannery office and issue licenses on the basis of such applications; and (c) for plaintiff to then remit to defendant by its own checks the license tax fees due from such fishermen.

4. In accordance with such practice, before the opening day of the fishing season in 1949, plaintiff's fishermen at its cannery at Naknek, Alaska, had signed such applications and had delivered them to plaintiff. Without payment of the license fees, plaintiff began its fishing operations there in 1949. Defendant's deputy visited this cannery on July 6, 1949, and requested from plaintiff payment of such license taxes, but payment was refused by plaintiff and the signed applications were not given to defendant's deputy. Thereupon the deputy tax collector warned plaintiff's officers and fishermen that they were subject to arrest and prosecution under the law, the former for employing unlicensed fishermen and the latter for not paying the tax. On the deputy's return to Naknek on July 16, 1949, the applications for each of the nonresident fishermen employed there by plaintiff were handed to such deputy by plaintiff, he made out and issued licenses for each fisherman, and plaintiff then gave to him its check covering the total amount of license taxes due from all of said fishermen.

5. At no time was any complaint lodged with any magistrate charging plaintiff or any of its officers with the violation of any of the provisions of Chapter 66, Session Laws of Alaska, 1949; at

no time did defendant or any of his deputies make any attempts to arrest any of plaintiff's officers or agents; and no threat to seize plaintiff's property or to invoke or to pursue any remedy for the collection of such tax from the person or property of plaintiff was ever made.

6. Of the \$30,105.00 claimed by plaintiff, \$21,500.00 represents instances where either the application or license of plaintiff's fishermen, or plaintiff's checks in payment of their license taxes, have stamped thereon the words "Paid Under Protest"; and \$8,595.00, instances where none of such papers have on them any writing indicating that this amount was paid under protest.

7. No assignments of the claims for refund of such license tax fees were made by any of such fishermen to plaintiff.

From the foregoing findings of fact, the court makes the following:

#### Conclusions of Law

1. Until March 7, 1951, defendant's deputies were not empowered to make arrests for violations of the provisions of Chapter 66, Session Laws of Alaska, 1949.

2. Chapter 66, Session Laws of Alaska, 1949, did not require plaintiff to pay the tax imposed upon its fishermen employees; was not directed in terms or in practical operation against plaintiff; was not self-executing, as that term is used in the law of duress; and, therefore, did not compel plaintiff to make the payments for which it seeks recovery.

3. Requests made by defendants deputy of plaintiff to pay the license taxes of its fishermen employees were made pursuant to the established practice referred to above in Finding of Fact No. 3, and not from any notions, on the part of defendant or his deputies, of liability of plaintiff for such taxes; did not constitute a demand upon plaintiff to pay such taxes; and did not compel plaintiff to make the payments for which it seeks a refund.

4. The license taxes imposed under Chapter 66, Session Laws of Alaska, 1949, and paid to defendant by plaintiff for the years 1949, 1950 and 1951 for and on behalf of the nonresident fishermen employees of plaintiff were not paid under duress or coercion imposed by defendant or any of his agents or deputies.

5. Plaintiff is not the real party in interest within the meaning of Rule 17, Federal Rules of Civil Procedure—

(a) with respect to the license taxes paid by plaintiff by way of deductions from the wages of its fishermen employees, for plaintiff was the mere agent for the remission of such taxes and has no right to claim a refund of the same; and

(b) with respect to the taxes paid by plaintiff from its own funds under a provision in its employment contracts requiring it to do so, for the only effect of such contract provision was to augment the compensation of the fishermen, thus entitling them, and not plaintiff, to a refund of license taxes exacted under an invalid law.

6. Plaintiff is not entitled to recover, and the action should, therefore, be dismissed.

Order for Judgment

It is Hereby Ordered, that this action be dismissed and that defendant have judgment against plaintiff for his costs and disbursements incurred herein and for a reasonable attorney's fee.

Dated at Ketchikan, Alaska, this 26th day of November, 1952.

/s/ GEORGE W. FOLTA,  
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 26, 1952.

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In the District Court for the Territory of Alaska,  
Division Number One at Juneau  
Civil Cause No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a  
Corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,

Defendant.

JUDGMENT AND DECREE

This cause came on for trial before the court on September 23, 1952, on plaintiff's amended complaint and the answer and amendment thereto of defendant to plaintiff's amended complaint. Plain-

tiff was represented by H. L. Faulkner of Faulkner Banfield and Boochever of Juneau, Alaska; defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence was adduced before the court on behalf of plaintiff and defendant, arguments were made and briefs filed by counsel for plaintiff and defendant, and the cause was submitted for judgment on September 23, 1952. On November 10, 1952, the court rendered its written opinion, which was that day filed with the clerk of the court, and thereafter made and filed its findings of fact, conclusions of law and order for judgment.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed—

1. That this action be, and it hereby is dismissed; and

2. That defendant have judgment against plaintiff for defendant's costs and disbursements herein, to be hereinafter taxed and inserted herein by the clerk of the court, in the sum of \$. . . . ., and for a reasonable attorney's fee to be allowed by the court and inserted herein in the sum of \$. . . . .

Done in Open Court this 26th day of November, 1952, at Ketchikan.

/s/ GEORGE W. FOLTA,  
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 26, 1952.



[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

Comes Now the plaintiff, Pacific American Fisheries, Inc., a corporation, and submits to the court its objections to the findings of fact and conclusions of law submitted by defendant with his request, dated November 20, 1952, and to the proposed judgment and decree, submitted therewith, as follows:

1. Plaintiff objects to finding number 4 for the reason that it is not based upon facts adduced at the trial, as the facts show that at Naknek, Alaska, the nonresident fishermen in the employ of plaintiff refused to pay the tax or license fee, and that the deputy tax collector called them together and threatened to arrest them and have them put in jail for non-payment of the license fee, and he threatened to arrest the officers of the plaintiff and its representatives, and that it was upon the threats of arrest and the criminal penalties of the law and loss of property that plaintiff and its nonresident fishermen employees paid the license fees, and that they were paid because of the threats and penalties and loss of property and income to the fishermen and to plaintiff which would be the result of non-payment; and the fishermen authorized payment from their wages on the promise of the plaintiff that it would immediately bring suit attacking the validity of Chapter 66, Session Laws of

Alaska, 1949, and make every effort to recover back the license fees, all of which were paid under protest.

2. Plaintiff objects to finding number 5, because it is not in accord with the evidence and the facts. The evidence shows that the deputy tax collector had full power to institute criminal proceedings against the plaintiff and its nonresident fishermen in the Commissioner's Court at Naknek, and that he had already instituted such criminal proceedings against some nonresident fishermen in the employ of the Alaska Packers Association, and had warrants issued for their arrest, and the evidence further shows that threats of arrest were made by the deputy tax collector against the officers and representatives of the plaintiff.

3. Plaintiff objects to the conclusions of law number 1, wherein it is stated that the defendant's deputies were not empowered to make arrests for violations of the provisions of Chapter 66, Session Laws of Alaska, 1949, as being contrary to the facts, because the defendant's deputies were at all times empowered to make complaints before the U. S. Commissioner at Naknek, and other places, and cause warrants to be issued for both the officers and employees of the plaintiff and the nonresident fishermen in its employ.

4. Plaintiff objects to conclusion of law number 2, in which it is stated that the provisions of the law were not self-executing, for as a matter of fact the law itself imposed drastic criminal penalties on the

plaintiff for having in its employ nonresident fishermen who had not paid the tax levied under the provisions of Chapter 66, Session Laws of Alaska, 1949.

5. Plaintiff objects to conclusion of law number 3, as being misleading and not based upon the facts, and the law itself, and it objects to the conclusion that the defendant did not compel plaintiff to make payments for which it seeks a refund, for the evidence showed that plaintiff was compelled either to pay the tax itself, or submit to criminal prosecution, or suffer large property loss by reason of its failure to obtain a supply of fish for its canning operations.

6. Plaintiff objects to conclusion of law number 4, for the reason that it is contrary to the evidence and the facts of the case.

7. Plaintiff objects to conclusion of law number 5, as not being supported by the law and the rules of civil procedure, and especially to subdivision (b) of conclusion number 5, in which it is stated that with reference to the amount of the taxes paid by plaintiff from its own funds under a provision of its employment contracts with the men requiring it to do so, this amounted to additional compensation for the fishermen, which entitled them and not the plaintiff to a refund of license fees paid by the plaintiff from its own funds.

8. Plaintiff further objects to conclusion of law number 6, for the reason that it is not based upon the law and the facts.

9. Plaintiff further objects to the proposed judgment and decree submitted by defendant, for the reason that it is contrary to the law and the facts which were adduced in evidence and the facts which were admitted by defendant.

10. Plaintiff objects to the allowance of costs and disbursements to defendant, and particularly to the allowance of any sum as attorney's fees, for the reason that defendant has had the use of the various sums of money paid by plaintiff for from 18 months to three and a half years without interest.

Dated at Juneau, Alaska, this 24th day of November, 1952.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ H. L. FAULKNER,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 25, 1952.

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[Title of District Court and Cause.]

MINUTES—FRIDAY, DECEMBER 19, 1952

With Robert Boochever in behalf of H. L. Faulkner, counsel for plaintiff, present, and with John Dimond present in behalf of defendant, oral arguments on exceptions to Findings of Fact and Conclusions of Law were waived. The court then overruled the exceptions to the Findings and Conclusions and further ruled that costs would not be allowed to either party. It was stipulated between counsel that

time for filing notice of appeal would commence running from this date, December 19, 1952, and that the court's decision in regard to the exceptions to the Findings and Conclusions would be considered to be the denial of a motion under Rule 52 (b) to amend or make additional findings of fact, the court agreed to this latter stipulation.

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[Title of District Court and Cause.]

**NOTICE OF APPEAL**

Notice is hereby given that Pacific American Fisheries, Inc., a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and decree entered in this action on the 26th day of November, 1952, and from the whole thereof.

Dated at Juneau, Alaska, December 26, 1952.

**FAULKNER, BANFIELD &  
BOOCHEVER,**

By /s/ R. BOOCHEVER,  
Attorneys for Plaintiff.

I certify that a true and correct copy of the foregoing notice was mailed postage prepaid to J. Gerald Williams, Attorney General of Alaska, attorney for Defendant, this 26th day of December, 1952.

/s/ R. BOOCHEVER,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed December 26, 1952.

[Title of District Court and Cause.]

### COST BOND ON APPEAL

Know All Men by These Presents:

That we, Pacific American Fisheries, Inc., a corporation, the plaintiff hereinabove named, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, the above-named defendant, and his successors in office, for the benefit and indemnity of whom it may concern, in the penal sum of Five Hundred (\$500.00) Dollars, to be paid M. P. Mullaney, the defendant above named, or his successors in office, for which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, by these presents.

Dated at Juneau, Alaska, January 19, 1953.

Whereas on November 26, 1952, in a suit pending in the District Court for the Territory of Alaska, First Judicial Division, between plaintiff and defendant above named, a judgment was rendered in favor of defendant and against plaintiff, dismissing plaintiff's complaint, and the plaintiff having filed notice of appeal to the United States Court of Appeals for the Ninth Circuit,

Now Therefore, the condition of this obligation is such that if plaintiff-appellant above named, and principal herein, shall prosecute the appeal to effect and answer all costs if the appeal be dismissed, or if it be affirmed by judgment of the appellate court

and pay all such costs as the appellate court may award if the judgment be modified, and shall pay the costs to the defendant, then this obligation to be void, otherwise to remain in full force and effect.

PACIFIC AMERICAN FISH-  
ERIES, INC.,  
Principal.

By /s/ H. L. FAULKNER,  
Its Attorney and Agent.

[Seal] UNITED STATES FIDELITY  
AND GUARANTY COMPANY,  
Surety.

By /s/ R. E. ROBERTSON,  
Agent.

Approved as to form and surety this 19th day of  
January, 1953.

/s/ JOHN H. DIMOND,  
Assistant Attorney General,  
Attorney for Defendant.

[Endorsed]: Filed January 19, 1953.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON  
BY APPELLANT, AND ASSIGNMENTS OF  
ERROR

The appellant, Pacific American Fisheries, Inc., a corporation, alleges that the Findings of Fact, Conclusions of Law and Judgment and Decree of the above-entitled court, entitled in this cause, and dated November 26, 1952, are erroneous and injurious to plaintiff; and plaintiff files herewith the following assignments of error on which it will rely, namely:

1. The Court erred in making and entering the Order of July 17, 1952, dismissing plaintiff's original complaint.

2. The Court erred in making and entering Finding of Fact No. 3 on November 26, 1952, relating to the "established practice" under the provisions of Chapter 66 of the Session Laws of Alaska, 1949, for the reason that the year 1949 was the first year Chapter 66 was in effect, and there could have been no "established practice" so far as it relates to Chapter 66.

3. The Court erred in omitting from Finding of Fact No. 4 the fact that the uncontroverted evidence showed the applications for nonresident fishermen's licenses given to defendant's deputy at Naknek on July 16, 1949, were given under protest and that the license fees paid there in July, 1949, were paid under protest and accepted under protest.



4. The Court erred in making and entering Finding of Fact No. 6, which reads as follows:

“6. Of the \$30,105.00 claimed by plaintiff, \$21,500.00 represents instances where either the application or license of plaintiff’s fishermen, or plaintiff’s checks in payment of their license taxes, have stamped thereon the words “Paid Under Protest”; and \$8,595.00, instances where none of such papers have on them any writing indicating that this amount was paid under protest.”

for the reason that the uncontroverted testimony shows that all license fees involved were paid under protest and under duress and compulsion.

5. The Court erred in its Conclusion of Law No. 1, which reads as follows:

“1. Until March 7, 1951, defendant’s deputies were not empowered to make arrests for violations of the provisions of Chapter 66, Session Laws of Alaska, 1949.”

for the reason that it is contrary to law, as the deputies were empowered to file complaints and cause arrests to be made for any violation of the provisions of Chapter 66, Session Laws of Alaska, 1949, and for the reason that the testimony of Deputy Thomas S. Parke shows that he had the power to cause arrests to be made and that he had exercised that power in several instances just prior to July 16, 1949.

6. The Court erred in making and entering Conclusion of Law No. 2, which reads as follows:

“2. Chapter 66, Session Laws of Alaska, 1949, did not require plaintiff to pay the tax imposed upon its fishermen employees; was not directed in terms or in practical operation against plaintiff; was not self-executing, as that term is used in the law of duress; and, therefore, did not compel plaintiff to make the payments for which it seeks recovery.”

for the reason that while the law did not impose the license tax on the plaintiff, the practical operation of the law was to exact payment from plaintiff under duress if plaintiff's non-resident fishermen refused to pay the tax, and that the effect of the law was to compel the plaintiff to pay the license tax or fee on its non-resident fishermen.

7. The Court erred in making and entering Conclusion of Law No. 3, as the same is contrary to the law and the evidence.

8. The Court erred in making and entering Conclusion of Law No. 4, in which it is stated that the fees paid by plaintiff for and on behalf of the non-resident fishermen, employees of plaintiff, were not paid under duress or coercion imposed by defendant or any of his deputies.

9. The Court erred in making and entering Conclusion of Law No. 5, which reads as follows:

“5. Plaintiff is not the real party in interest within the meaning of Rule 17, Federal Rules of Civil Procedure—

(a) with respect to the license taxes paid by

plaintiff by way of deductions from the wages of its fishermen employees, for plaintiff was the mere agent for the remission of such taxes and has no right to claim a refund of the same; and

(b) with respect to the taxes paid by plaintiff from its own funds under a provision in its employment contracts requiring it to do so, for the only effect of such contract provision was to augment the compensation of the fishermen, thus entitling them, and not plaintiff, to a refund of license taxes exacted under an invalid law.”

10. The Court erred in Conclusion of Law No. 6, in which it is held that plaintiff's action should be dismissed.

11. The Court erred in making and entering its Order for Judgment dated November 26, 1952, ordering the action to be dismissed.

12. The Court erred in making and entering Judgment and Decree herein, dated November 26, 1952, in which Judgment and Decree plaintiff's action is dismissed.

13. The Court erred in making and entering the Order of December 19, 1952, overruling plaintiff's objections to defendant's proposed Findings, Conclusions and Decree.

Wherefore, plaintiff prays that the Findings of Fact and Conclusions of Law and the Decree of the District Court of November 26, 1952, based thereon, be set aside and the cause reversed, and that judg-

ment be entered in favor of plaintiff for the amounts set forth in the amended complaint.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD &  
BOOCHEVER.

By /s/ H. L. FAULKNER,  
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 19, 1953.

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[Title of District Court and Cause.]

#### STIPULATION RE PRINTING OF RECORD

It is hereby stipulated and agreed by and between Faulkner, Banfield & Boochever, attorneys for plaintiff above named, and John H. Dimond, Assistant Attorney General, attorney for defendant above named, that in printing the papers and records to be used in the hearing on appeal in the above-entitled cause before the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers, except on the first page of the record, and that there shall be inserted in place of the title on all papers used as part of the record the words, "Title of District Court and Cause"; also that all endorsements on all papers used as a part of the record may be omitted, except the Clerk's filing marks and admission of service. It is further stipulated that all original exhibits be forwarded to the Clerk of the

U. S. Court of Appeals, but that plaintiff's Exhibits 1 and 6 and defendant's Exhibit B need not be printed.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD &  
BOOCHEVER.

By /s/ H. L. FAULKNER,  
Attorneys for Plaintiff.

/s/ JOHN H. DIMOND,  
Assistant Attorney General, Attorney for Defendant  
M. P. Mullaney, Commissioner of Taxation.

[Endorsed]: Filed January 19, 1953.

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In the United States Court of Appeals for the  
Ninth Circuit  
No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a  
Corporation,

Appellant,

**vs.**

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,

Appellee.

**APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF PARTS OF REC-  
ORD TO BE PRINTED**

Comes now the appellant above named and adopts  
the Statement of Points to be Relied on by Appel-

lant filed with the Clerk of the District Court in this cause, as its Statement of Points to be Relied Upon in the United States Court of Appeals for the Ninth Circuit, and prays that the whole of the record, as filed and certified, be printed, with the exception of plaintiff's Exhibits 1 and 6 and defendant's Exhibit B.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD &  
BOOCHEVER.

By /s/ H. L. FAULKNER,  
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 19, 1953. U.S.D.C.

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[Title of District Court and Cause.]

### ORDER

Upon motion of John H. Dimond, defendant's attorney, it is hereby

Ordered, that defendndant have leave to amend his answer by striking all of the Third Defense on Page 4 of defendant's answer and by substituting therefor the following:

#### Third Defense

All of the persons named in plaintiff's Exhibit "A," attached to the amended complaint,

are indispensable parties to this action and have not been made parties.

Done in open court at Juneau, Alaska, this 22nd day of September, 1952.

/s/ GEORGE W. FOLTA,  
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed in open court September 23, 1952.

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[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD  
AND PROCEEDINGS TO BE INCLUDED  
IN THE RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above-entitled cause, and to include in the transcript of record the following described papers and records which the appellant, Pacific American Fisheries, Inc., a corporation, herewith designates as those portions of the record and proceedings herein which they deem should be contained in the record on appeal in this cause.

1. Plaintiff's Original Complaint.
2. Defendant's Motion to Dismiss Original Complaint.

3. Opinion on Defendant's Motion to Dismiss Complaint.
4. Order Dismissing Original Complaint.
5. Plaintiff's Amended Complaint, with Exhibit "A" attached.
6. Defendant's Answer.
7. Defendant's Amendment to Answer.
8. Plaintiff's Exhibit No. 1 (Photostats of checks).
9. Plaintiff's Exhibit No. 3, Bulletin of Tax Commissioner dated June 6, 1950.
10. Plaintiff's Exhibit No. 4, Certified Copy of Complaint in Intervention of Ned F. Andrich in Cause No. 6137-A.
11. Plaintiff's Exhibit No. 5, Certified Copy of Defendant's Answer to Andrich Complaint in Cause No. 6137-A.
12. Defendant's Exhibit A, Statement of Claim for Refunds.
13. Defendant's Exhibit B, Original License Applications.
14. Court's Opinion.
15. Findings of Fact and Conclusions of Law and Order for Judgment.
16. Judgment and Decree.
17. Plaintiff's Objections to Findings, Conclusions and Judgment.
18. Court's Minute Order dated December 19, 1952, Overruling Plaintiff's Objections to Findings and Decree, etc.
19. Notice of Appeal.
20. Reporter's Transcript of Record.



21. Bond on Appeal.
22. Statement of Points Relied on by Appellant.
23. Stipulation re Exhibits and Printing of Record.
24. Appellant's Statement of Points and Designation of Parts of Record to be Printed.
25. This Designation of Portions of Record and Proceedings to be Included in the Record on Appeal.

Dated at Juneau, Alaska, this 19th day of January, 1953.

FAULKNER, BANFIELD &  
BOOCHEVER.

By /s/ H. L. FAULKNER,  
Attorneys for Plaintiff and  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 19, 1953.

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[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTION  
OF RECORD TO BE INCLUDED IN REC-  
ORD ON APPEAL

Defendant-appellee designates the following additional portion of the record to be included in the record on appeal:

1. Order dated September 23, 1952, granting defendant leave to amend his answer.

2. This designation of additional portion of record to be included in record on appeal.

Dated at Juneau, Alaska, this 22nd day of January, 1953.

/s/ JOHN H. DIMOND,  
Attorney for Defendant-Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 22, 1953.

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In the District Court for the Territory of Alaska,  
Division Number One, at Juneau

No. 6621-A

PACIFIC AMERICAN FISHERIES, INC., a  
Corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,

Defendant.

#### REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 23rd day of September, 1952, at 10:00 o'clock a.m. at Juneau, Alaska, the above-entitled cause came on for hearing before the Court without a jury, the Honorable George W. Folta, United States District Judge, presiding; the plaintiff appearing by H. L. Faulk-

ner, its attorney; the defendant appearing in person and by John H. Dimond, Assistant Attorney General of Alaska; and the following occurred:

The Court: You may proceed in this case.

Mr. Faulkner: If the Court please, I suppose it is not necessary for me to make a statement of what the suit is about. It is a suit to refund some non-resident fishermen's licenses under the provisions of Chapter 66 of the Session Laws of 1949. The amount in the complaint has been slightly changed by stipulation between Mr. Dimond and myself. We found [1\*] that we had included there twenty-six nonresident fishermen for whom the license fees had already been refunded. That reduces the amount by \$1170.00. We have made the appropriate changes all through the complaint, so that brings the amount claimed down to \$30,105.00. Of that amount the company itself paid \$20,610.00 and deducted from the pay of the men \$9,495.00. There is no dispute regarding the amount. We don't need to go into that. We do want to introduce a little testimony. There are two points of law involved here. One is as to whether the amounts may be refunded, hinging on the question of whether it was paid under protest or duress. The other one is whether the company, admitting here that in certain cases they deducted the amount of the license fee from the pay of the men, is the real party in interest in this suit to recover. Those are the two questions of law.

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Are the parties agreed as to the issues?

Mr. Faulkner: As to the two questions of law. Well, Mr. Dimond contends that, since the Company—he has amended his answer—that, since the company was not the taxpayer, that is, the tax was not levied on the company, the payments made by the company may not be recovered by the company. So, that will be a question to be decided. And in that connection we have a stipulation here that shows the Court that in certain places, in certain areas, the amount involved was absorbed [2] and paid by the company under agreements with the men—those are union agreements. We have stipulated as to the contents of those agreements, which are quite voluminous, and that will avoid the necessity of introducing them. It may be that the first thing to do would be to read this stipulation.

“It is stipulated and agreed between plaintiff and defendant that the following provision is contained in the fishermen’s union contracts entered into between the Alaska Salmon Industry, Inc., and the Alaska Fishermen’s Union for the years 1948, 1949, 1950 and 1951 for salmon fishing for salmon canneries in Alaska in the districts known and designated as Western Alaska, Chignik, Kodiak, Cook Inlet and Southeast Alaska, to wit: ‘Territorial fishing licenses when required, shall be paid by the Company for men covered by this Agreement who work exclusively for the Company.’ and that this stipulation may be read in evidence and received upon the trial of the above-entitled cause in the

same manner and have the same force and effect as though the entire written contract for each of the years above mentioned had been introduced and received in evidence. Dated at Juneau, Alaska, September 12, 1952. H. L. Faulkner, Attorney for Plaintiff. John H. Dimond, Assistant Attorney General, Attorney for Defendant.”

The Court: Now, as I take it, that requires the company to pay the tax just as though it were a part of the wages without any right to subsequent reversion. [3]

Mr. Faulkner: That is right.

The Court: Well, how does that become material here?

Mr. Faulkner: It only becomes material if we have to separate these amounts which they paid themselves from the amounts which they deducted from wages. That is the only materiality of that, your Honor.

The Court: Well, it just seems to me that it would simplify matters if, after it was shown what was deducted, then the remainder presumably would be what was paid. The procedure under which it was paid would seem to me to be immaterial, that is, a provision in the contract would be, it seems to me, immaterial. The question is whether they paid it, regardless of whether there was a provision in the contract or not.

Mr. Faulkner: You mean whether the company paid it?

The Court: Yes.

Mr. Faulkner: Well, we will do that. We have

the evidence here of that. I want to call the Court's attention to this stipulation. It refers to these contracts as being entered into between the Alaska Salmon Industry and the Union. We will show the Court that all of these men were members of the union, which was a party to that contract, and that the Pacific American Fisheries was a member of the Alaska Salmon Industry.

The Court: Well, couldn't that be agreed [4] upon, stipulated to?

Mr. Faulkner: I think so.

Mr. Dimond: Oh, yes.

The Court: I think that has been established in so many other cases.

Mr. Faulkner: It is stipulated that the men involved in this case were all members of the union, which was a party to the contract referred to in the stipulation, and that the Pacific American Fisheries is a member of the Alaska Salmon Company, Incorporated, and, therefore, a party to the contract.

The Court: Do you agree as to the issues?

Mr. Dimond: Well, there is one other issue, your Honor. In the third defense to the defendant's answer to the amended complaint the defendant alleged that the persons from whom the license fees were deducted were indispensable parties and had not been joined, and the defense that we raise is under Rule 12 H. I would like to amend that defense at this time to state that all persons, both those from whom the license fees were deducted and those for whom plaintiff paid the tax, are indis-

pensable parties. I don't think Mr. Faulkner has any objection.

Mr. Faulkner: No; no objection.

The Court: This was not passed on before, this particular question.

Mr. Dimond: No. [5]

Mr. Faulkner: I don't think so.

Mr. Dimond: No; that defense wasn't raised on the motion to dismiss. The basis of the motion to dismiss was that the plaintiff wasn't the real party in interest.

The Court: It may be so amended then.

Mr. Dimond: That is the only other issue, your Honor, in addition to the ones Mr. Faulkner mentioned.

The Court: Very well. You may proceed then.

#### Plaintiff's Case

Mr. Faulkner: Now, if the Court please, in order to simplify the matter I think the first issue to be raised would be the question of whether these fees were paid under protest and what the protest was, and for that purpose I would like to read first the deposition of Mr. Edwards.

The Court: I have read it, so that——

Mr. Faulkner: Well, that may be included as a part of the record?

The Court: Yes.

#### DEPOSITION OF R. E. EDWARDS

a witness on behalf of plaintiff (Direct Interrogatories and Answers thereto):

Q. 1. Please state your name.

A. 1. R. E. Edwards

(Deposition of R. E. Edwards.)

Q. 2. Where are you employed? [6]

A. 2. Pacific American Fisheries, Inc., 401 Harris Street, Bellingham, Washington.

Q. 3. Where were you employed in July, 1949, and by whom, and in what capacity?

A. 3. Naknek Cannery; Pacific American Fisheries, Inc.; bookkeeper.

Q. 4. If you have answered that you were employed during that period by Pacific American Fisheries, Inc., the plaintiff in the above-captioned case, please state whether you were so employed on July 6 and 7, 14, 15, 16 and 17, 1949?

A. 4. Yes.

Q. 5. Were you employed by Pacific American Fisheries, Inc., the plaintiff, during the years 1950 and 1951? A. 5. Yes.

Q. 6. Are you acquainted with Thomas S. Parke, Enforcement Officer and Special Deputy of the Department of Taxation, Territory of Alaska?

A. 6. Yes.

Q. 7. If your answer to the last question is in the affirmative, please state whether you saw Mr. Parke at the Naknek cannery of the plaintiff on July 6, 1949. A. 7. Yes.

Q. 8. If your answer to the last question is in the affirmative, please state what occurred during Mr. Parke's visit [7] to the Naknek cannery on July 6, 1949.

A. 8. Mr. Parke is Enforcement Officer and Special Deputy of the Department of Taxation for Alaska. He arrived at the Naknek Cannery at



(Deposition of R. E. Edwards.)

about 10:00 p.m. on July 6th, 1949. He came to the office and requested that the company pay the Alaska Nonresident Fishermen's License Fees of \$50.00 each on all nonresident fishermen employed by the company as fishermen and crews of tenders. He said that all those men were being employed illegally under the Act, which would subject them and the company's representatives to arrest. I told him I would need to have authority from the Home Office in Bellingham before making any payments. Mr. Parke left early the next morning.

Q. 9. Did you see Mr. Parke again after July 6, 1949, and if so, where and under what circumstances?

A. 9. Mr. Parke came again to the Naknek Cannery on July 14th, 1949, but the fishermen, superintendent and bookkeeper were out on the fishing grounds, and Mr. Parke left during the morning hours.

Q. 10. Did Mr. Parke say anything to you in July, 1949, regarding the liability of the representatives of Pacific American Fisheries, Inc., to arrest for having in its employ or purchasing fish from nonresidents who had not paid the nonresident fishermen's tax levied under the provisions of Chapter 66, Session Laws of Alaska, 1949? [8]

A. 10. Yes.

Q. 11. Please state the substance of Mr. Parke's statement in this regard.

A. 11. He told me that he had authority under the Act to subject to arrest the representatives of

(Deposition of R. E. Edwards.)

the company for having nonresident fishermen and tender crews in the employ of the company unless the license fees were paid. He said he could tie up the pack of the cannery if we continued to fish illegally.

Q. 12. Please state what else occurred during Mr. Parke's subsequent visits to Naknek in the month of July, 1949, with reference to the collection of the nonresident fishermen's license fees from employees of the plaintiff, Pacific American Fisheries, Inc., and from fishermen from whom the plaintiff was purchasing fish at that time.

A. 12. On July 16th, 1949, Mr. Parke again arrived at the Naknek cannery of the plaintiff at 9:30 a.m. Mr. Tarrant, vice-president of the company, Mr. A. W. Nelson, superintendent, and I were there. Mr. Parke again demanded that the company pay the tax on nonresident fishermen or be subject to criminal prosecution. Mr. Parke held a meeting with the nonresident fishermen, without representation of the company, and I was told by the fishermen that Mr. Parke informed them they would be subject to arrest and prosecution if the license fees were not paid. The [9] fishermen agreed to have the company pay the fees for them "under protest" in order to avoid arrest and prosecution. The fishermen instructed me to make payments of license fees "under protest" by cannery check. It was the custom at all canneries in all years to make payment by company check on behalf of its fishermen to the Tax Collector.

(Deposition of R. E. Edwards.)

Q. 13. Please state what was done by the Company and by you and the officials of the Company with reference to the payment of the nonresident fishermen's license fees in 1949.

A. 13. The Company, by company check made payable to the Tax Commissioner, paid all the nonresident fishermen's license fees demanded. These were paid "under protest." One check, dated July 16th, 1949, is in the sum of \$3,090.00, and one check, dated July 18th, 1949, is in the sum of \$750.00. The one dated July 16th includes 60 nonresidents at \$50.00 each and 18 residents at \$5.00 each.

Q. 14. State whether these nonresident fishermen's license fees were paid by the plaintiff company in 1950 and 1951 under the same circumstances as they were paid in 1949.

A. 14. Yes, in 1950. In 1951 some canneries had received word from the home office to pay nonresident fishermen's fees at the \$5.00 level only. [10]

Q. 15. State the method employed by the Tax Commissioner of Alaska and his deputies in making collection of nonresident fishermen's license fees each year from nonresident fishermen in the employ of salmon packing companies, as to whether collections are made by the Tax Collectors and deputies directly from the fishermen or through the company.

A. 15. For the convenience of the Tax Commissioner, all payments were made by company and by company checks. The company also handles all the paper work in connection with applications for licenses.

(Deposition of R. E. Edwards.)

Q. 16. Has this been the custom with reference to Pacific American Fisheries, Inc., the plaintiff herein, at its Naknek cannery, and other canneries where you have been employed?

A. 16. Yes, at all times.

Q. 17. Were all such collections made for non-resident fishermen's license fees in the same manner each year?

A. 17. Yes, each year.

Q. 18. Please state the method employed with reference to the preparation and filing of applications and payment of tax and receipt of licenses at the Naknek cannery of the plaintiff and at other canneries where you have been employed.

A. 18. The license applications are made out at the cannery [11] office and transmitted to the Tax Commissioner or his deputy, with company check for the amount of the license fees; the license fees are not collected from the individual fishermen direct. This method saves much expense and time to the Tax Commissioner and it is employed for his convenience.

Q. 19. Until the arrival of Mr. Parke, Deputy Tax Collector, at Naknek cannery of plaintiff in July, 1949, had the non-resident fishermen in plaintiff's employ agreed to pay the non-resident fishermen's tax, or refused to pay it?

A. 19. The non-resident fishermen had refused to pay the tax. I was informed by the fishermen that this was on advice from their unions and attorneys.

Q. 20. Did the Pacific American Fisheries, Inc.,

(Deposition of R. E. Edwards.)

the plaintiff, or any one of the non-resident fishermen in its employ, or any non-resident fishermen from whom it purchased fish in the years 1949, 1950 and 1951 voluntarily and without protest pay any non-resident fishermen's tax to the defendant?

A. 20. No, to my knowledge they did not. And at the time the agreement was made with Mr. Parke for payment "under protest" it was agreed that all payments of the non-resident fishermen's license fees would be accepted as "under protest" and that the Pacific American Fisheries, [12] Inc., on its own behalf and on behalf of the men, should bring suit in court promptly to test the validity of the law under which the license fee was levied and imposed.

Q. 21. For what reason were the non-resident fishermen license fees paid by the plaintiff on its own behalf and on behalf of non-resident fishermen in its employ, and from whom it purchased fish at the places where you were employed in 1949, 1950, and 1951?

A. 21. In order to avoid arrest and criminal prosecution, and to enable us to continue packing fish.

(The signature of the witness and the certificate of the Notary Public appear on the original deposition on file in the case. As reflected in the Notary's certificate, the date of taking of the deposition was September 12, 1952.)

(Deposition concluded.)

## MONRAD B. HANSEN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Faulkner:

Q. Mr. Hansen, will you state your name?

A. Monrad B. Hansen.

Q. Where do you live, Mr. Hansen?

A. Portland, Oregon. [13]

Q. What kind of work do you do?

A. I am a fisherman and a longshoreman.

Q. And how long have you been a fisherman?

A. Since 1927 included.

Q. Where do you fish?           A. Bering Sea.

Q. For whom?

A. Pacific American Fisheries.

Q. Now, Mr. Hansen, are you a member of the Alaska Fishermen's Union?       A. Yes.

Q. Which is a party to the contract we just referred to?       A. That is right.

Q. How long have you been a member of that union?       A. Since 1927.

Q. Now, in 1949 and '50, were all non-resident fishermen who fished in Alaska members of that union?       A. Yes.

Q. And how are the union—how is the union business conducted at the canneries? Do you conduct it through the men themselves in a body or do you have a representative?

A. We have a representative.

Q. What is he called?       A. A delegate.

(Testimony of Monrad B. Hansen.)

Q. And who was the delegate at Naknek—where were you fishing [14] in 1949?

A. Naknek Cannery.

Q. Of the Pacific American Fisheries?

A. Pacific American Fisheries.

Q. Who was the delegate of the union there at that time?

A. John Storkersen.

Q. Were you at the cannery on July 16, 1949, when Mr. Parke, a deputy tax collector, was there?

A. Yes.

Q. Did you have a meeting with Mr. Parke?

A. Yes.

Q. Now, was that the non-resident fishermen?

A. All fishermen attended the meeting.

Q. Now, what day of the week was that?

A. The 16th proved to be on a Saturday.

Q. That was not a fishing day?

A. It was a fishing day up until six o'clock in the evening.

Q. And after that it was not; it was closed?

A. It was closed.

Q. Now, Mr. Hansen, how long was the fishing season at Naknek that year? How many fishing days were there under the regulations?

A. Well, I would say seventeen or eighteen days, whichever the case might be.

Q. Seventeen or eighteen days. Now, at this meeting you held with Mr. Parke, what did you discuss?

A. Mr. Parke was sent over from the office to explain to us that the licenses had been raised from

(Testimony of Monrad B. Hansen.)

twenty-five dollars to fifty, and of course the men didn't like it, and we had a meeting with him there, and a fellow brought up the question, in case we refused to pay it, what he would do, and he said we would all be put in jail.

Q. Now, prior to that time had you refused to pay the license?      A. Yes.

Q. Had there been some instructions or communications of the union upon this license fee of fifty dollars?      A. No.

Q. Had the union given any advice regarding the payment of it?

A. Not to my knowledge.

Q. But you hadn't paid it at that time?

A. No.

Q. How is this license fee ordinarily paid?

A. It is paid by the company, where each individual has to go to the company and sign on before they can deduct off of your wages.

Q. When is that usually done?

A. It is usually done before the fishing season starts.

Q. That year you hadn't done it, in '49?

A. No. [16]

Q. Now, Mr. Parke then told you that the fee of fifty dollars was due, and, if it wasn't paid, you say, that you would be put in jail?

A. That is right.

Q. Now, then what was decided by the fishermen there?

A. It was decided we would have to pay; in



(Testimony of Monrad B. Hansen.)

order to keep fishing, we would have to pay, and it was paid under protest.

Q. What other arrangements did you make?

A. We afterwards instructed our delegate to see the company about collecting this money back for us.

Q. And did the company agree to bring suit at that time?

A. I guess they did. I wouldn't know that.

Q. Did they agree that they would, that the company would, try to get this money back?

A. Yes.

Q. Now, have you discussed the matter with any of the other members, nonresident fishermen?

A. Yes.

Q. Since then? A. Yes.

Q. And what is the attitude now of the nonresident fishermen?

A. They are all looking forward to getting it back from the company and expect the company to collect it for us.

Q. Now, Mr. Hansen, you say Mr. Storkersen was the delegate there. He was a nonresident fisherman there. [17] A. That is right.

Q. In 1949? A. Yes.

Q. Now, do you know about his bringing a suit?

A. Yes.

Q. And do you know of your own knowledge that he got his money back? A. Yes.

Q. Got all of it back?

A. He got all of it back for the year of '49.

Mr. Faulkner: I think that is all.

(Testimony of Monrad B. Hansen.)

Cross-Examination

By Mr. Dimond:

Q. Mr. Hansen, are you a fisherman or tenderman?           A. I am a fisherman.

Q. You are not a tenderman?           A. No.

Q. This meeting that you spoke about on July 16th, do you remember how many men attended that meeting, approximately?

A. We usually try to get as many men together before a meeting is held as possible, and, as a rule, I would say ninety-nine per cent are there.

Q. Of all the fishermen?

A. Of all the fishermen. [18]

Q. Not just tendermen?

A. Not just tendermen. They can also attend if they wish to, but they usually don't attend those meetings.

Q. You stated that all the nonresidents were looking forward to having the company get their money back. How many nonresidents have you talked to about this matter?

A. Oh, I have talked to several of them. In fact, each one expects its own company, wherever they fished, to collect that money back for them. They didn't all fish for the Pacific American Fisheries, you know.

Mr. Dimond: That is all.

(Testimony of Monrad B. Hansen.)

Redirect Examination

By Mr. Faulkner:

Q. Just one other question, Mr. Hansen; I overlooked it. What position do you hold with the union now?

A. I am just a plain fisherman. This last summer I was a delegate up there myself, but that was just for the season.

Q. For the season?

A. It is for each season; that is right.

Mr. Faulkner: That is all.

(Witness excused.)

Mr. Faulkner: If the Court please, I want to introduce, I don't think I have to introduce it, but call the Court's attention to the pleadings in 6137-A, which was the injunction [19] suit, and I think that is proper, just call the Court's attention to another case pending in the same court. There are one or two of the documents in there that I will want to introduce after I have some other testimony.

The Court: Well, you are asking me to take judicial notice of some particulars in that case?

Mr. Faulkner: Yes; of the pleadings in that case.

The Court: Of the pleadings?

Mr. Faulkner: Yes.

## KENNETH C. BAGLEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Faulkner:

Q. Mr. Bagley, will you state your name?

A. Kenneth C. Bagley.

Q. What do you do? What is your occupation?

A. I am chief accountant for Pacific American Fisheries.

Q. How long have you held that position?

A. Since 1950; late in 1950.

Q. And prior to that time what did you do?

A. I was assistant to the chief accountant.

Q. And before that?

A. I was accountant for Pacific American Fisheries.

Q. Are you familiar with the company's plants and its method [20] of operation? A. I am.

Q. And you are familiar with all of the accounts? A. Yes.

Q. And did you bring here with you all the original documents, journal entries and accounts and checks with reference to the payment of the nonresident fishermen's licenses in 1949, 1950 and 1951? A. Yes.

Q. Mr. Bagley, have you been employed at any of the plants? A. Yes.

Q. Where?

A. In 1940 I was at Petersburg Cannery; 1942

(Testimony of Kenneth C. Bagley.)

at Kasaan Cannery; 1943 at King Cove Cannery; and 1944 and 1945 at Alitak Cannery; and 1946 at Port Moller Cannery.

Q. Now, Mr. Bagley, we have alleged here that the company paid to the Tax Commissioner under the provisions of the nonresident fishermen's license law in 1949, 1950 and 1951, certain license fees totaling \$30,105.00. Are you familiar with those payments? A. Yes.

Q. Do you have here with you the original checks by which the payment was made?

A. I do.

Q. Issued to whom? [21]

A. To Mr. Mullaney, Tax Commissioner.

Q. Now, have you made photostat copies of those checks? A. Yes, sir.

Mr. Faulkner: If the Court please, I think we have agreed that these photostats may be used rather than the original checks, which are in the box here attached to the journal.

Mr. Dimond: No objection.

The Court: They may be admitted.

Q. (By Mr. Faulkner): I will hand you a series of checks and accounts, Mr. Bagley, and ask if those are photostat copies—or what are they?

A. They are photostat copies of the original checks that were issued to the Territory and returned to us through our bank statement as canceled and paid.

Q. They have not only the check but the endorsement? A. That is right.

(Testimony of Kenneth C. Bagley.)

Q. Now, do those represent the amounts claimed in this case?

A. Not entirely; no. There are a few resident five-dollar licenses in these amounts.

Q. But they represent, that is, all of the non-resident fishermen's licenses are included in those checks, are they? A. That is right.

Q. And a few residents?

A. A few residents. [22]

Q. And in most instances those are marked on the checks?

A. In most instances they are marked on the checks; yes.

Mr. Faulkner: Now, we would offer those photo-stats in evidence. Mr. Dimond has seen them.

Mr. Dimond: No objection.

The Court: They may be admitted.

Mr. Faulkner: We might put them all in as one exhibit; is that all right?

The Court: I think so, unless you wish to put in testimony about some particular one of them which, I suppose, there isn't going to be any.

Mr. Faulkner: No.

The Court: They may be admitted as Plaintiff's Exhibit No. 1.

The Clerk: So marked.

Q. (By Mr. Faulkner): Now, Mr. Bagley, I want to ask you to explain briefly to the Court about the preparations for salmon packing and fishing each year by the company. What is done? Maybe to simplify the matter I might ask you,

(Testimony of Kenneth C. Bagley.)

does the company have to make preparations at each one of these places for fishing and canning?

A. Yes.

Q. And does that entail a considerable expenditure of money in advance of the fishing season?

A. Quite a huge sum. [23]

Q. How much would that be approximately?

A. Oh, I would say a million dollars or better.

Q. A million dollars or more? A. Yes.

Q. Mr. Tarrant's affidavit says a million and three hundred thousand dollars. Would that be correct? A. That is approximately correct; yes.

Q. Now, Mr. Hansen testified the fishing season at Naknek in 1949 was seventeen or eighteen days; is that correct?

A. I believe that seventeen days is correct.

Q. The actual fishing days. Now, in the beginning of the season—oh, I might ask you—the company itself pays and assumes the nonresident fishermen's licenses at certain places?

A. That is right.

Q. That stipulation covers everything except Bristol Bay; is that right?

A. That is right, with the exception of some independent fishermen in other districts.

Mr. Faulkner: Now, I might call the Court's attention to this. We have set up in the complaint a complete analysis of these payments by canneries and given the check number, the cannery, the year, the date paid and the amount, whether it was deducted or not, so that the Court can see at a glance

(Testimony of Kenneth C. Bagley.)

there in Exhibit A just how these payments stand, and [24] you will note that in some of the areas where the contract provides that the company pays the licenses for fishermen in their employ, you will note that in some of those instances there are payments credited to the men. I am asking Mr. Bagley the question now so to explain that those cases were independent fishermen not in the direct employ of the company at the time.

Q. (By Mr. Faulkner): Now, do those men all belong to the same union? A. Yes.

Q. Covered by the same contract? A. Yes.

Q. Now, Mr. Bagley, you were not at Naknek of course in 1949? A. No.

Q. Have you been there?

A. I spent a week at Naknek in 1946.

Q. In '46. What is the custom for the fishermen there on Saturday and Sunday closed periods; where do they go?

A. They come into the cannery.

Q. They come into the cannery on Saturday and Sunday. Now, in making these payments to the Tax Commissioner, the record here shows they were all made by company checks?

A. That is right.

Q. And did you have any—did the company to your knowledge have any understanding with the men as to testing this law, the validity of the law, and applying to recover [25] license fees, both those that were paid by the company and those that were paid by the men?



(Testimony of Kenneth C. Bagley.)

A. Well, we, at our home office in Bellingham, had no personal contact with the men in regard to that, but it was general knowledge in our office that that would be done.

Q. Did you have any instructions regarding procedure in that respect?

A. Well, we had verbal conversations with our assistant secretary-treasurer and a letter from our assistant secretary-treasurer instructing us to promptly upon receipt of the refunds get it back to the men as quickly as possible in the cases where they had stood the charges themselves.

Q. Do you have any written instructions on that point?

A. Yes; a letter from Mr. D. L. Fickel, who is the assistant secretary-treasurer of our company.

Q. And the man in charge of that?

A. Yes.

Q. Now, I will ask you if this is the letter you received from Mr. Fickel?

A. Yes, that is the letter.

Q. What is the date?           A. March 6, 1952.

Mr. Faulkner: I want to offer this in evidence, but I would like Mr. Dimond to read it first. He may have [26] some objection.

Mr. Dimond: No objection.

Mr. Faulkner: We will offer this in evidence as Plaintiff's Exhibit No. 2.

The Clerk: The exhibit is so marked.

Mr. Faulkner: This is: "Subject: Claim for Refund on Non-Resident Fishermen's License Fee."

(Testimony of Kenneth C. Bagley.)

Dated "March 6, 1952." Pacific American Fisheries letterhead. "To Mr. K. C. Bagley. Mr. Faulkner's letter of March 5th, 1952, indicates that the court has held the \$50.00 nonresident fishermen's license tax to be invalid, and that the fee for nonresidents and residents alike should be \$5.00 each. You will please arrange to put in motion through Mr. Faulkner's office a claim for the refund of the \$45.00 excess per license that we have paid during the years 1949, 1950 and 1951. Although we have discussed this phase before, I want to remind you that in some instances the licensee, by the very nature of the contract under which he was working, was required to pay the license and therefore you should be extremely careful in setting up your claim. In other words, prepare your claim in such manner that immediately upon receipt of the refund from the Department of Taxation of the Territory of Alaska, individual checks can be mailed directly to the employee who paid his own license fee through us. It may be that the Department of Taxation of the Territory of Alaska will wish [27] us to execute an agreement whereby we guarantee that if the refund is made directly to us, we will immediately pass it on to the one who had previously absorbed the cost; if this should be desirable, we of course would be agreeable to such procedure. In any event, you should make whatever arrangements are necessary in order to insure that the refund promptly reaches the fisherman if he originally absorbed the tax." Signed "D. L. Fickel."

(Testimony of Kenneth C. Bagley.)

Q. (By Mr. Faulkner): Now, Mr. Bagley, what was the procedure at these canneries in the collection of these nonresident fishermen's licenses? How did the Tax Commissioner proceed, and how did the company proceed?

A. The company proceeded to have all fishermen call at the cannery office where the bookkeeper and his assistant would make out the formal applications for license and compile a list, separating the nonresident from the resident, and forward the list and application and check in payment to the collector, sometimes direct to Mr. Mullaney's office and sometimes to the collector, depending on what district was affected. At some canneries the collector did not call, and at some canneries the collector did call.

Q. Now, the license applications then were made out at the canneries?

A. At the canneries. [28]

Q. And the licenses were handled how? Where were the licenses delivered when they were issued?

A. They were delivered to the cannery.

Q. And did you always get them during the fishing season? A. Not always; no.

Q. Sometimes after it was closed?

A. Sometimes afterwards.

Q. So long as the money was paid in, you were safe? A. That is right.

Q. Now, was that generally done, that license matter taken care of, at the beginning of the season?

A. At the beginning of the season; yes.

Q. And would it be sometimes that the company

(Testimony of Kenneth C. Bagley.)

would pay this money before there was any fish money earned?      A. Oh, yes.

Q. The company advanced it, in other words?

A. Yes.

Q. And have you checked the complaint in this case and the list of nonresidents?      A. Yes.

Q. And the names of canneries?      A. Yes.

Q. With these checks?      A. Yes.

Q. And is that correct? [29]

A. That is correct.

Mr. Faulkner: I think, your Honor, there is no dispute about that anyway. It is conceded.

Q. (By Mr. Faulkner): Now, have any suits been filed against the company to date by any of the men suing under this license?      A. No.

Q. No demand has been made on the company yet?      A. Not to my knowledge; no.

Q. And your understanding generally is that they are waiting for the company to get the money?

A. That is correct.

Mr. Faulkner: I think that is all.

#### Cross-Examination

By Mr. Dimond:

Q. Mr. Bagley, in the answer to Interrogatory No. 8 of Mr. Edwards' deposition it states in part that he told Mr. Parke that he would need to have authority from the home office in Bellingham before making any payments. Were you in Bellingham in July, 1949?      A. Yes.

(Testimony of Kenneth C. Bagley.)

Q. Do you recall any instructions given to Mr. Edwards with respect to the payment or nonpayment of the fishermen's license tax? [30]

A. Not first hand. Mr. Fickle was handling the matter at that time.

Q. You don't know what the statement made by Mr. Edwards was or what those instructions were?

A. No.

Mr. Dimond: That is all.

### Redirect Examination

By Mr. Faulkner:

Q. Oh, there is one other question that I overlooked asking you, Mr. Bagley. I think it is admitted. Mr. Bagley, did the company, the plaintiff in this case, receive any communications from the Tax Commissioner with reference to the payment of the nonresident license tax? A. Yes.

Q. I will hand you here a bulletin and ask you if the company received that? A. Yes.

Mr. Faulkner: And I might offer that in evidence. I think there is no objection to this.

Mr. Dimond: No objection.

The Court: It may be admitted.

Mr. Faulkner: I don't need to read this, do I, your Honor?

The Court: No, you don't. [31]

Mr. Faulkner: It is simply a letter addressed "To All Fish Buyers and Cannerymen: For your convenience and future guidance we quote Section 5

(Testimony of Kenneth C. Bagley.)  
of Chapter 66 pertaining to the licensing of fishermen in the Territory of Alaska.” And then the section is quoted, and the portion of it regarding the illegality of fishing without a license is capitalized and underscored, and then the part providing for the penalties are underscored and capitalized. This is signed by the Tax Commissioner and dated June 6, 1950. That would be Plaintiff’s Exhibit No. 3.

The Clerk: So marked.

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PLAINTIFF’S EXHIBIT No. 3

(copy)

Department of Taxation—Territory of Alaska  
Box 2751, Juneau, Alaska

June 6, 1950.

To All Fish Buyers and Cannerymen:

Re: Chapter 66, SLA 1949—Fishing Licenses

Dear Sirs:

For your convenience and future guidance we quote Section 5 of Chapter 66 pertaining to the licensing of fishermen in the Territory of Alaska.

Chapter 66, SLA—Section 5

“It Shall Be Unlawful for Any Person, Association or Corporation, or Agent of Any Association or Corporation, to Have in His, Their, or Its Employ Any Fisherman, Who Is Not Duly Licensed Under This Act or to Purchase Fish From Any Fisherman Who Is Not So Licensed. Each

(Testimony of Kenneth C. Bagley.)

Buyer of the Fish Shall Keep a Record of Each Purchase Showing Name of Boat From Which the Catch Involved Is Taken, Amount Purchased, and the Names of All Persons Attached to the Boat, Who Participated In the Trip on Which the Fish or Shellfish Were Taken. Such Records May Be Kept on Forms Provided by the Tax Commissioner, But Must Be Kept in Any Event, and Each Person Charged With Keeping Such Records Must Report Same to the Tax Commissioner in Accordance With Rules and Regulations Promulgated by Him. Anyone Violating Any of the Provisions of This Section Shall Be Guilty of a Misdemeanor, and Upon Conviction, Punishable Under the Penalty Clause of This Act."

It is not the policy of the Department of Taxation to inconvenience anyone; however, the provisions of the Section pertaining to the purchasing of fish from fishermen must be complied with to avoid invoking the penalty clause of the Act.

Very truly yours,

M. P. MULLANEY,  
Tax Commissioner;

By /s/ NORMAN E. SOMERS,  
Chief Assistant.

NES:w

Received in evidence September 23, 1952.

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(Witness excused.)

Mr. Faulkner: I want to call Mr. Mullaney for a question or two.

MATTHEW P. MULLANEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Mullaney, you are the Tax Commissioner of Alaska?      A. Yes, sir.

Q. The defendant in this case?

A. Yes, sir.

Q. Have you checked with your records the amounts claimed by the plaintiff in this application for refund of [32] nonresident fishermen's licenses?

A. I have.

Q. And do you find the amounts claimed in the complaint the same as your records show?

A. That is correct.

Q. Now, so far as the names and amounts are concerned, that is correct?      A. That is correct.

Q. Do you have any record, Mr. Mullaney, showing the portion that was paid by the company as distinguished from the portion where they deducted from the wages of the men?

A. We have some records that came in with a letter that was addressed to us; yes.

Q. And those check; I mean, there is no dispute about it?      A. No dispute on that.

Q. And this bulletin we have introduced here



(Testimony of Matthew P. Mullaney.)

as Plaintiff's Exhibit No. 3, I will ask you if that was a bulletin sent out from your office?

A. That is a copy of it.

Q. That is a copy of it?

A. That is correct.

Q. Now, Mr. Mullaney, there is some—what position does Mr. Parke hold with your office?

A. Enforcement officer and special deputy.

Q. And he went to Naknek in 1949 to collect these licenses? [33]

A. He did.

Q. Did he go to any other area except to Bristol Bay?

A. I don't know. He could answer that. He covered all the fishing areas.

Q. Now, these checks that were received, Plaintiff's Exhibit No. 1, they were all received from the Pacific American Fisheries?

A. That is correct.

Q. And the licenses were sent to them; is that right?

A. That is correct.

Q. Now, in some of these checks, Mr. Mullaney, they are marked "Paid under protest" and in one or two or them, three or four perhaps, they are not marked that way?

A. That is right.

Q. You have examined these checks?

A. I have.

Q. Now, I will call your attention to Naknek, the Naknek check, two checks, for \$3,090.00 and \$750.00; is that right; is that the amount?

A. I would have to look.

Q. I thought you had that in your mind. Maybe

(Testimony of Matthew P. Mullaney.)

I am wrong, but I have it right here. Yes, that is right, those two; there is one for seven hundred and fifty, those two right there, and one is for \$3,090? A. Yes. [34]

Q. Now, those checks, one of them, the one for \$3,090.00, dated July 16th, is not marked "Paid under protest," is that right?

A. I believe that is correct.

Q. But did you check up the actual applications from that cannery on that date to see how they were marked?

A. I believe so, yes. Yes, that was checked.

Q. The applications themselves were marked "Paid under protest," is that correct?

A. The application or the duplicate license was marked that way; that is correct.

Q. Now, sometimes the applications were marked "Paid under protest" and the check not?

A. That is correct.

Q. And sometimes the check was marked "Paid under protest" and the application was not?

A. That is right.

Q. And in issuing the licenses did you always follow the practice of marking on it whether it was under protest or not in accordance with the check or the application?

A. That was not generally done. However, in most instances we did it, but unfortunately the one that issued some of those licenses failed to mark them.

Q. Yes. In some of those cases where the check was actually marked "Paid under protest" the li-

(Testimony of Matthew P. Mullaney.)

censes were not? [35] A. That is correct.

Q. Like at Petersburg. I have them here for 1949. A. That is right.

Q. I think there is no dispute about that. Now, I might ask you about the check here for Alitak. Here is a check, Mr. Mullaney, the very first check in this series is Alitak, \$4,405.00, and it is for 88 nonresident licenses and 1 resident license; that is correct? A. That is correct.

Q. And now, that check was not marked "Paid under protest"? A. That is correct.

Q. Now, that is one of the cases where you consider no protest was made? A. That is right.

Q. Well, now, Mr. Mullaney, I will call your attention to—wasn't it your understanding from the very beginning that these payments were being resisted and that the companies, plaintiff and the other companies, and the nonresident fishermen were contending that the law was not valid?

A. Oh, we had a little difficulty in trying to collect them; yes.

Q. Well, I mean, that was your general understanding all the way through, that they were resisting the payment of this tax?

A. In some instances they did, and some they did not. [36]

Q. Well, but they had litigation pending, didn't they? A. That is right.

Q. And challenged the validity of the law right away after the Naknek incident?

A. Yes, that is correct.

(Testimony of Matthew P. Mullaney.)

Q. Now, then, referring to Alitak, you are familiar with the case that was brought by plaintiff, to test the validity of this law, on August 4, 1949, where you were the defendant?

A. That is right.

Q. That went through the courts. Now, you understood then that the company was contesting the law for itself and the men?

A. Yes, I did.

Q. In that suit. Now, in that suit, Mr. Mullaney, do you remember Mr. Ned Andrich intervened, an individual fisherman?      A. I don't recall.

Q. There were a number of intervenors. Well, I call your attention to a complaint in intervention which is in this file which the Court has here.

Mr. Faulkner: I suppose we should show that to the witness.

The Court: If he has no recollection of it.

Mr. Faulkner: The complaint in intervention, and the answer, of Ned F. Andrich; certified [37] copies.

The Court: Do you wish to ask merely whether he remembers it or——

Mr. Faulkner: No. I want to ask him some questions about it.

The Court: Then it better be shown to the witness.

Q. (By Mr. Faulkner): Now, I will show you the original complaint in intervention of Ned F. Andrich in cause No. 6137-A and ask you if you remember receiving that, had it served on you.

(Testimony of Matthew P. Mullaney.)

A. I remember it now, yes.

Q. Now, then, right over there is the answer to it. It should have a clip on it too. Do you see it? No, that isn't it. Let me see if I can find it. I put a clip on it there so we wouldn't waste time looking for it. I will hand it to you and ask you if that part of the file is your answer to the complaint of Ned Andrich in that case. That is the original file.

Mr. Dimond: If the Court please, I probably prepared it.

A. I don't see my name on it at all. My name isn't on it. I can't find out where I signed this.

Mr. Faulkner: Maybe counsel will admit that is the original complaint and answer.

The Court: What was the original question? I missed that because of talking to the clerk. Did you raise [38] some objection?

Mr. Dimond: No. If the answer weren't verified, your Honor, I probably prepared the answer and Mr. Mullaney hasn't seen it, so I can stipulate or agree this is the original.

Mr. Faulkner: Well, is it agreed that that is the original complaint and answer in that case; that is all?

Mr. Dimond: Yes, it is.

Mr. Faulkner: Now, if the Court please, I want to introduce those in evidence and I would then withdraw them so they could remain in the file and introduce these certified copies which I handed to the clerk.

(Testimony of Matthew P. Mullaney.)

Mr. Dimond: How are these material, Mr. Faulkner?

Mr. Faulkner: Well, they are material this way, that this check, Mr. Mullaney doesn't give us credit for paying this Alitak license under protest. It is forty-four hundred dollars. The complaint in intervention shows that Mr. Andrich, an employee of the company in Naknek, a nonresident fisherman, in August, 1949, intervened in the case to test the validity of the law. He alleged that he appeared for himself and all other nonresident fishermen in Alaska, all in the employ of the plaintiff, and all from whom they bought fish, and all other similarly situated, and that they were threatened with criminal prosecution if the tax were not paid, and those two allegations are admitted in the answer so—this was [39] on the question of protest—it was claimed that this particular check was not paid under protest. We want to show that the check wouldn't need to be marked under protest in view of all the circumstances and especially in view of the admission that this man was threatened if he didn't pay it. That is the reason for offering this complaint and answer in that case.

The Court: Do you still object?

Mr. Dimond: No objection. Just one question. Didn't these people withdraw from the suit?

Mr. Faulkner: No, not Andrich. He never withdrew.

Mr. Dimond: No objection.

The Court: It may be admitted.

(Testimony of Matthew P. Mullaney.)

Mr. Faulkner: The Nakat Company and the Todd Company and Libby, McNeil & Libby withdrew from that suit. No one else that I know of.

The Clerk: The copy of the complaint will be Exhibit 4 and the answer Exhibit 5.

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PLAINTIFF'S EXHIBIT No. 4

District Court for the Territory of Alaska  
Division Number One at Juneau  
Civil Action File No. 6137-A

PACIFIC AMERICAN FISHERIES, INC.,  
Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,  
Defendant.

THE NAKAT PACKING CORPORATION, a  
Corporation, et al.,  
Plaintiffs in Intervention,

NED F. ANDRICH,  
Plaintiff in Intervention,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,  
Defendant.

COMPLAINT IN INTERVENTION OF  
NED F. ANDRICH

The above-named Ned F. Andrich, plaintiff in intervention, for himself and all other nonresident fishermen similarly situated, alleges:

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

1. That this plaintiff in intervention is a resident of Anacortes, State of Washington, and he is a purse seiner employed by the plaintiff hereinabove named in the operation of a purse seine boat in the waters of Southeastern Alaska engaged in fishing for salmon for the plaintiff, and he brings this action for himself and as representative of and on behalf of all the 400 nonresident fishermen in the employ of the plaintiff and from whom plaintiff purchases fish, and also on behalf of all other persons similarly situated, and this action is brought pursuant to the laws of the Territory of Alaska and under Rule 23 of the Rules of Civil Procedure, and the right sought to be enforced by the plaintiff in intervention for himself and on behalf of the class represented is several, and the object of the action is the adjudication of claims which are identical, and it is several in the further sense that there are common questions of law and fact affecting the several rights of this intervening plaintiff and all others represented, and a common relief is sought.

2. This intervening plaintiff, for himself and all others of the class represented, incorporates herein with like effect, as though fully set forth at length, all of the allegations contained in paragraphs 1 to 12, inclusive of the Complaint of plaintiff in this action, and reference is made thereto and they are herein alleged. (Rule 10, Rules of Civil Procedure.)

3. That the defendant and his deputies and



(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

agents have demanded from this intervening plaintiff and all others similarly situated who are represented herein, and who are in the employ of the plaintiff, payment of the fifty dollar tax levied on nonresidents who are fishermen, by the provisions of Chapter 66, Session Laws of Alaska, 1949, and on each nonresident employed in plaintiff's fishing operations who is defined as a fisherman under the provisions of Chapter 66, and on the plaintiff in intervention and each one of the class represented herein, and the defendant and his deputies and agents have threatened plaintiff with criminal prosecution and with arrest and severe penalties unless this intervening plaintiff and all members of the class represented herein pay to the defendant the tax of fifty dollars imposed on nonresident fishermen as defined in Chapter 66.

4. That the facts set forth in the affidavits of S. G. Tarrant, filed with the original Complaint herein and dated August 3 and August 9, 1949, are true and are correct, and the statements therein made are adopted by this intervening plaintiff for himself and all others similarly situated by reference, as though fully set forth herein.

5. That the Territory of Alaska is insolvent and unable to meet its obligations, and if the tax is paid by this intervening plaintiff and others represented herein, even though under protest, there is no means of obtaining refund in case the Court holds the tax

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

to be invalid, and plaintiff in intervention has no adequate, speedy or plain remedy at law, and compliance with the demands of defendant for the payment of the tax from this plaintiff in intervention and all others whom he represents and who are similarly situated will require the payment of a large sum of money which cannot be recovered, and that defiance to the law will carry with it the risk of heavy fines and long imprisonment and that withdrawal from further fishing in the waters of Alaska until a test case can be taken through the courts will result in a great loss of business to the plaintiff in intervention and to all others similarly situated whom he represents, for which no compensation can be obtained, and that there is no plain, speedy or adequate remedy for the irreparable injury which will thus be suffered by the plaintiff in intervention and those whom he represents.

6. That this intervening plaintiff and all others similarly situated are willing to pay the tax imposed by the provisions of Chapter 66 in case its provisions should be upheld by the Court, and in order to secure payment of the tax to the Territory in that event, the plaintiff has filed a bond herein in the sum of \$16,000.00, which bond is sufficient to secure to the defendant the payment of the entire tax imposed by the provisions of Chapter 66 on this plaintiff in intervention and all others represented herein, as more fully set forth in the Complaint, and the bond was filed in this suit for that purpose,

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

so that pending a hearing on the merits, the defendant is already protected fully by the bond.

7. That unless restrained by this Court, and enjoined, the defendant under the provisions of Chapter 66 will proceed with the arrest of all the non-resident fishermen referred to herein and disrupt their fishing operations and necessitate a multiplicity of suits, and the relief sought herein is necessary to avoid that result.

Wherefore, this intervening plaintiff prays:

1. That he may be permitted to intervene herein on his own behalf and on behalf of all others similarly situated, and that his Complaint in Intervention be filed.

2. That process issue against the defendant to answer this Complaint in Intervention (but not under oath or affirmation, the benefit of which is hereby waived by intervenor.)

3. That pending a hearing on intervenor's application for a preliminary injunction, the Court issue herein a temporary restraining order restraining the defendant and his agents and deputies from doing any act or thing for the purpose of enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, which apply to nonresident fishermen, as therein defined, or for the purpose of collecting from these intervenors any part of the tax levied on nonresident fishermen or from interfering with the operations of nonresident fishermen who decline to pay the tax for the reasons aforesaid.

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

4. That after notice and hearing, this Court grant to intervenor a preliminary injunction restraining defendant and his agents and deputies from doing any act or thing for the purpose of enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, which apply to nonresident fishermen, as therein defined, or for the purpose of collecting from intervenors any part of the tax levied on nonresident fishermen or from interfering with the operations of nonresident fishermen.

5. That upon final hearing, this Court enter a final order and decree to the same effect.

6. That upon the final hearing, the Court enter an order adjudging and decreeing that Chapter 66 of the Session Laws of Alaska, 1949, is null and void and of no legal force or effect as it applies to nonresident fishermen, as therein defined, who are engaged in the salmon fishing industry in Alaska.

7. That the Court grant such other relief as may seem meet in the premises.

NED F. ANDRICH,

Plaintiff in Intervention.

By /s/ H. L. FAULKNER,

His Agent and Attorney.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ H. L. FAULKNER.

Attorneys for Intervenor.

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

United States of America,  
Territory of Alaska—ss.

I, H. L. Faulkner, being first duly sworn on oath,  
depose and say:

That I am agent and attorney for the intervening plaintiff hereinabove named, that I make this affidavit for and on his behalf; that he is presently on the fishing grounds in Southeastern Alaska more than 100 miles distant from Juneau and not at the place where the verification is required to be made; that I am familiar with all the facts alleged in the Complaint in Intervention and that they are true and correct.

/s/ H. L. FAULKNER.

Subscribed and sworn to before me this 15th day  
of August, 1949.

/s/ S. P. FREEMAN,  
Notary Public for Alaska.

My commission expires April 26, 1953.

Receipt of copy of the Complaint in Intervention is acknowledged by plaintiff and plaintiff consents to the filing thereof and to the allegations with reference to the application of the provisions of the bond filed by it to this plaintiff in intervention and all others similarly situated as the bond was in fact

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)  
filed for the purpose of securing the payment of the  
tax due from them.

Dated at Juneau, Alaska, August 15, 1949.

PACIFIC AMERICAN  
FISHERIES, INC.,

By /s/ H. L. FAULKNER,  
Its Attorney in Fact.

I certify that the foregoing is a true and correct  
copy of the original Complaint in Intervention of  
Ned F. Andrich, intervening plaintiff.

/s/ H. L. FAULKNER,  
Attorney for Intervening  
Plaintiff.

United States of America,  
Territory of Alaska,  
First Division—ss.

I, J. W. Leivers, Clerk of the District Court in  
and for the First Division, Territory of Alaska, do  
hereby certify that the hereto attached is a full, true  
and correct copy of the original Complaint in Inter-  
vention of Ned F. Andrich, cause #6137-A, en-  
titled Pacific American Fisheries, Inc., vs. M. P.  
Mullaney, et al., now remaining among the records  
of the said Court in my office.

In Testimony Whereof, I have hereunto sub-  
scribed my name and affixed the seal of the afore-

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 4—(Continued)

said Court at Juneau, Alaska, this 23rd day of September, A. D. 1952.

J. W. LEIVERS,

Clerk.

By /s/ IRENE R. ERICKSON,

Deputy Clerk.

Received in evidence September 23, 1952.

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PLAINTIFF'S EXHIBIT No. 5

In the District Court for the Territory of Alaska,  
Division Number One at Juneau  
No. 6137-A

PACIFIC AMERICAN FISHERIES, INC., a  
Corporation,

Plaintiff,

THE NAKAT PACKING CORPORATION, a  
Corporation, Plaintiff in Intervention, and  
Other Intervenors,

vs.

M. P. MULLANEY, Commissioner of Taxation,  
Territory of Alaska,

Defendant.

ANSWER TO COMPLAINT IN INTERVEN-  
TION OF NED F. ANDRICH, INTERVENOR

Comes now defendant above named and in answer to the Complaint in Intervention of Ned F. Andrich on file herein, admits, denies and alleges as follows:

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 5—(Continued)

1. Admits the allegations contained in Paragraph I of the Complaint in Intervention.

2. Referring to Paragraph 2 of intervenor's Complaint in Intervention, defendant incorporates herein, with like effect as though fully set forth at length, all of the matters contained in his Answer to the allegations contained in Paragraphs I to XII, inclusive, of the Complaint of plaintiff in this action, which Answer is on file herein.

3. Admits the allegations contained in Paragraph 3 of the Complaint in Intervention.

4. Referring to Paragraph 5 of the Complaint in Intervention, admits that defiance to the law will carry with it the risk of heavy fines and imprisonment. Denies each and every other material allegation contained therein.

5. Referring to Paragraph 6 of the Complaint in Intervention, defendant admits the allegation that plaintiff has filed a bond herein in the sum of \$16,000.00; but denies each and every other material allegation of said Paragraph 6.

6. Denies the allegations contained in Paragraph 7 of the Complaint in Intervention.

Wherefore, defendant having fully answered the Complaint in Intervention filed herein by intervenor, prays that the Intervenor take naught by reason



(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 5—(Continued)

thereof and that the same be dismissed with prejudice.

J. GERALD WILLIAMS,  
Attorney General of Alaska.

JOHN H. DIMOND,

Assistant Attorney General, Attorneys for M. P. Mullaney, Commissioner of Taxation, Defendant.

I certify that the above and foregoing is a full, true and correct copy of the original Answer in the above-entitled cause.

/s/ JOHN H. DIMOND,  
Attorney for Defendant.

Filed in the District Court, Territory of Alaska, 1st Division, at Juneau, August 24, '49, A.M.

J. W. LEIVERS,  
Clerk;

By /s/ LOIS P. ESTEPP,  
Deputy.

United States of America,  
Territory of Alaska,  
First Division—ss.

I, J. W. Leivers, Clerk of the District Court in and for the First Division, Territory of Alaska, do hereby certify that the hereto attached is a full,

(Testimony of Matthew P. Mullaney.)

Plaintiff's Exhibit No. 5—(Continued)

true and correct copy of the original Answer to Complaint in Intervention of Ned F. Andrich, Intervenor, in cause #6137-A, entitled Pacific American Fisheries, Inc., vs. The Nakat Packing Company, et al., now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Juneau, Alaska, this 23rd day of September, A.D. 1952.

[Seal]                      J. W. LEIVERS,  
Clerk;

By /s/ IRENE R. ERICKSON,  
Deputy Clerk.

Admitted in evidence September 23, 1952.

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Q. (By Mr. Faulkner): Now, Mr. Mullaney, I just want to ask you one more question and that is, in making payment, you haven't made payment of any of these nonresident license fees, any refund of any of these nonresident fishermen's fees yet?

A. Which ones are you speaking of?

Q. I say, any of those involved in the complaint?

A. None; no. [40]

Q. Except—well, the Neva we took out.

A. Well, that has been adjusted as amended; that has been amended, so we are basing it on the amended.

(Testimony of Matthew P. Mullaney.)

Q. Now, Mr. Storkersen brought a suit to test the validity of this law; you remember that?

A. I do.

Q. And he got his fee back?

A. That is right.

Q. And that was paid how?

A. By warrant.

Q. Do you remember to whom the warrant was made payable?

A. I can't recall exactly whether it was to Mr. Storkersen or to you.

Q. It was to me.

A. I can't recall; but it was paid.

Mr. Faulkner: I think that is all.

Mr. Dimond: If the Court please, I have no cross-examination but I have one or two questions to ask Mr. Mullaney on my own case. If counsel has no other witnesses, I can ask them out of order.

The Court: Do you have any other witnesses?

Mr. Faulkner: I don't believe so, your Honor—if I might have a minute. There are one or two things I want to introduce for the Court's convenience. I may do it while Mr. Mullaney is on the stand. I am going to offer for the Court's [41] convenience a list of the names of nonresident fishermen, listed on Exhibit A, for whom the tax was deducted, and this is simply for the Court's convenience—they are all set up in the complaint—so you wouldn't have to go through that exhibit, and I gave a copy of this to Mr. Dimond. Do you have any objection?

Mr. Dimond: No objection.

Mr. Faulkner: I just introduce it.

The Clerk: Exhibit No. 6.

Mr. Faulkner: I think that is all.

### Defendant's Case

#### MATTHEW P. MULLANEY

called as a witness on his own behalf, having previously been duly sworn, testified as follows:

#### Direct Examination

By Mr. Dimond:

Q. Mr. Mullaney, I hand you this paper and ask you to state to the Court what it is.

A. A statement covering the claim for refund of nonresident fishing licenses paid for at fifty dollars each on which forty-five dollars each is claimed for refund.

Q. Did you prepare that statement?

A. I did.

Q. From the records of your office?

A. I did. [42]

Q. Plaintiff's Exhibit A attached to his complaint? A. That is correct.

Mr. Dimond: If the Court please, I would like to introduce this in evidence chiefly to show the breakdown at the time the check was received, how much of it was resident and how much nonresident, how much was paid under protest and how much was not paid under protest. It should facilitate

(Testimony of Matthew P. Mullaney.)

matters, help the Court in determining the final issues in this case, if there is no objection.

**Mr. Faulkner:** If the Court please, I don't think we have any objection to this. I do want to state this, that it is based on a theory different from our theory of the case, that is, this exhibit that Mr. Dimond just speaks of lists those items as paid under protest where the checks are so marked and that is the reason I introduced the Andrich pleadings to show that in that particular case, involving \$3,960.00, in that particular case, why, they brought a suit to protest it, everybody, and, as far as the figures are concerned and Mr. Dimond's intention, we have no objection to that.

**Mr. Dimond:** Well, we indicated that there is no statement on the check or verification. It is a matter of law.

**Mr. Faulkner:** Yes; that is a question of law. We have no objection to putting it in.

**The Court:** Well, it may be admitted.

**Mr. Faulkner:** I think the figures do not [43] differ from our total figures.

**The Clerk:** That will be Exhibit A.



## DEFENDANT'S EXHIBIT A

Department of Taxation—Territory of Alaska  
Office of the Tax Commissioner

Re: Pacific American Fisheries, Inc., Claim for Refund of Non-Resident Fishing Licenses Paid for at \$50.00 Each on Which \$45.00 Each Is Claimed for Refund

Name of Cannery	Plaintiff's Reference	No.	Draft		Distribution		Refund Claimed		Amount	
			Date	Amount	Resident	Non-Resident	Non-Resident	Amount	Protested	No Protest
Alitak Cannery .....	Exhibit "A" Page 1-3	41732	8-30-49	\$ 4,405.00	\$ 5.00	\$ 4,400.00	88 x \$45.00	\$ 3,960.00	.....	\$3,960.00
Alitak Cannery .....	Exhibit "A" Page 3-4	44087	6-24-50	5,100.00	.....	5,100.00	102 x 45.00	4,590.00	\$ 4,590.00	.....
Kasaan Cannery .....	Exhibit "A" Page 5	104	9- 4-49	1,610.00	60.00	1,550.00	31 x 45.00	1,395.00	1,395.00	.....
Kasaan Cannery .....	Exhibit "A" Page 5-6	136	9- 3-50	2,100.00	100.00	2,000.00	40 x 45.00	1,800.00	1,800.00	.....
King Cove Cannery .....	Exhibit "A" Page 6	45433	9- 2-49	2,015.00	315.00	1,700.00	34 x 45.00	1,530.00	.....	1,530.00
King Cove Cannery .....	Exhibit "A" Page 7-8	48379	7-17-50	4,300.00	50.00	4,250.00	85 x 45.00	3,825.00	3,825.00	.....
Naknek Cannery .....	Exhibit "A" Page 8	45776	7-18-49	750.00	.....	750.00	15 x 45.00	675.00	675.00	.....
Naknek Cannery .....	Exhibit "A" Page 8-9	45774	7-16-49	3,090.00	90.00	3,000.00	59 x 45.00	2,655.00	2,655.00	.....
Nushagak Cannery .....	Exhibit "A" Page 10	46842	9-26-49	400.00	.....	400.00	8 x 45.00	360.00	360.00	.....
Nushagak Cannery .....	Exhibit "A" Page 10	49352	7- 9-50	600.00	.....	600.00	12 x 45.00	540.00	540.00	.....
Petersburg Cannery .....	Exhibit "A" Page 10	47318	9-19-49	945.00	45.00	900.00	18 x 45.00	810.00	810.00	.....
Petersburg Cannery .....	Exhibit "A" Page 10-11	50048	8-14-50	1,450.00	.....	1,450.00	29 x 45.00	1,305.00	1,305.00	.....
Petersburg Cannery .....	Exhibit "A" Page 11	7911	8-24-50	60.00	10.00	50.00	1 x 45.00	45.00	.....	45.00
Port Moller Cannery .....	Exhibit "A" Page 11	47525	9-13-49	950.00	.....	950.00	19 x 45.00	855.00	855.00	.....
Port Moller Cannery .....	Exhibit "A" Page 11-12	50603	9-27-50	1,045.00	95.00	950.00	19 x 45.00	855.00	.....	855.00
Shumagin Cannery .....	Exhibit "A" Page 12	48893	9- 2-49	2,585.00	135.00	2,450.00	49 x 45.00	2,205.00	.....	2,205.00
Shumagin Cannery .....	Exhibit "A" Page 12-13	50830	7-15-50	950.00	.....	950.00	19 x 45.00	855.00	855.00	.....
Floater No. 1.....	Exhibit "A" Page 13	51782	7-19-50	1,750.00	.....	1,750.00	9 x 45.00	405.00	405.00	.....
Floater No. 1.....	Exhibit "A" Page 13-14	51302	6-26-51	800.00	.....	800.00	16 x 45.00	720.00	720.00	.....
Excursion Inlet .....	Exhibit "A" Page 14	50057	8-17-50	800.00	.....	800.00	16 x 45.00	720.00	720.00	.....
Totals				<u>\$35,705.00</u>	<u>\$905.00</u>	<u>\$34,800.00</u>	<u>669 x \$45.00</u>	<u>\$30,105.00</u>	<u>\$21,510.00</u>	<u>\$8,595.00</u>

(See Footnote)

Footnote: Explanation of Amounts Shown Under the Caption "Protested" and "No Protest"

Protested—Either the Application, Duplicate License, Draft or all three documents show, "Paid Under Protest"

No Protest—No evidence of being "Paid Under Protest" appears on the Application, Duplicate License or Draft.

Received in evidence September 23, 1952.

(Testimony of Matthew P. Mullaney.)

Mr. Dimond: That is all. Is that all you have, Mr. Faulkner?

Mr. Faulkner: I think so. Do you have any more? Pardon me; one other question. I think it is agreed on.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Mullaney, before this suit was brought was there an application made to you for a refund of the license fees involved in this suit?

A. Yes.

Q. Do you have that here?                   A. Yes.

Q. Could I see that?

Mr. Faulkner: I don't know; maybe we can shorten this if counsel will admit that.

The Court: I think that is something that can be agreed on.

Mr. Dimond: Yes.

Mr. Faulkner: Then it is admitted before bringing suit that plaintiff made application to the defendant for the refund or return of the license fees involved in this case.

(Witness excused.) [44]

THOMAS S. PARKE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dimond:

Q. Will you please state your name, residence and occupation?



(Testimony of Thomas S. Parke.)

A. Thomas S. Parke. I am enforcement officer and special deputy for the Department of Taxation.

Q. You live in Juneau, Alaska?

A. Juneau Alaska.

Q. How long have you been tax collector and special enforcement officer?

A. Since the Department of Taxation, since 1946, and I have had different titles, but it has amounted to about the same procedure as enforcement officer.

Q. Were you at the Naknek Cannery of plaintiff on July 6, 1949?      A. Yes.

Q. Will you please state what you did there with respect to the collection of the nonresident fishing license tax from the fishermen employed at that cannery on that date?

A. At that time I called at the cannery and asked, the usual procedure of receiving their applications and issuing the licenses and receiving the check for it and going on about my business, but at the time, why, I was given to understand and told that they couldn't turn over applications [45] for nonresident fishermen they were holding, that they had orders from the head office not to turn over the applications as they weren't to pay them and couldn't pay them without authority from the head office in Bellingham.

Q. Mr. Parke, did you make any threats to any officers of the company at that time?

A. No. I talked to Mr. Nelson, the superintendent, and the bookkeeper in regards to the law, quoted the law, and told them what my instructions were

(Testimony of Thomas S. Parke.)

from Juneau and that something would have to be done as far as issuing these licenses, and they said that I would just have to wait until they could find out what could be done from their head office in Bellingham.

Q. You left the cannery then and went elsewhere?      A. Yes, I did.

Q. When did you return, if you returned?

A. On July 14th.

Q. And what did you do on that day with respect to collecting these taxes?

A. In fact I didn't do much of anything. I called at the cannery and, as I understand that, they were having difficulties over a drowned man or something down the river, and the superintendent and everybody concerned that had any authority were away, so I stayed for an hour or two and then left and walked back to Alaska Packers Cannery, [46] and in the meantime I talked to Mr. Edwards, who was there at the time, and he said there was nothing could be done yet as far as he was concerned, things were in order, but he couldn't turn over any records.

Q. Mr. Parke, you did state though either to Mr. Edwards or to some other official there that they would be subject to arrest if they continued to employ unlicensed fishermen?

A. I told them that my duty there was to collect it and something would have to be done. I quoted the law and, that part of the law, in fact to the best of my knowledge I left them a copy of the law showing where they were liable for the licenses and

(Testimony of Thomas S. Parke.)

that the canneries would be liable if they had in their employ men that were unlicensed. As I understood it, they were unlicensed and the fishermen had no licenses and that none would be issued.

Q. Did you return to Naknek again after July 14th?      A. Yes, I did. I was there on the 16th.

Q. What happened then with respect to the collection of this tax?

A. At that time I collected the tax. At that time, why, it had been understood at other canneries where we had taken some action, and they agreed to pay under protest, so I went back to the Naknek Cannery, and they had a meeting with the fishermen, and I understood that some tender crew men were there also, and they agreed to pay it under [47] protest and go about their business of fishing.

Q. Did they hand you the applications already signed by the fishermen? Were they handed to you by the officials of the cannery?

A. The officials of the cannery gave me the applications, and I issued them before I left the cannery.

Q. Do you know when those applications were signed by the men?

A. We have it on the applications.

Q. Will you produce the applications and state what the applications show in respect to the fishermen at Naknek and the date of the signatures on the applications?

A. The tender men signed after, on July 18th; and the fishermen were signed on the 24th of June. 1949.

(Testimony of Thomas S. Parke.)

Q. The date, the 24th of June, shows on the applications?

A. On the applications, yes. I believe it is all identical.

Q. How many fishermen are there and how many tender men at Naknek in 1949, according to this list of applications you have?

A. I believe, according to the records, fifty-nine fishermen and fifteen tender men, and Storkersen is the next one.

Q. Did you check all the names on those applications against the names of the persons listed in Plaintiff's Exhibit A under the two Naknek headings?

A. Yes, I did, sir. [48]

Q. And do those names correspond to the names listed in Plaintiff's Exhibit?

A. Yes, they do.

Mr. Dimond: I would like to introduce these original applications in evidence, your Honor, for this purpose. The plaintiff claims that the tax was collected by reason of duress on either July 6th, 14th or 16th, and yet these applications on their face show that they were signed by the men on June 24th, consequently I think it is material to show that the men were agreeable to paying the tax long before Mr. Parke arrived there.

Mr. Faulkner: We have no objection to that, if the Court please. I think that is the wrong interpretation to put on it. The men come up here and go out on the fishing grounds. You have to get their license applications signed before they go, as Mr.

(Testimony of Thomas S. Parke.)

Bagley said. That is done in advance, and the fact of withholding them and not turning them in and not paying them indicates that they didn't intend to pay them. All the evidence shows that they didn't intend to pay them, but they had them on hand, and furthermore they did owe five dollars and would have to pay that. I have no objection but—

The Court: Well, it may be that they would not have much weight, at least from your viewpoint, but I think the objection would merely go to the weight, and they may be admitted. [49]

Mr. Dimond: Well, I have one other question.

Q. (By Mr. Dimond): On these applications, Mr. Parke, I note that the word "\$25.00"—this is probably an old form before the 1949 Session Laws—is crossed out and the word "\$50.00" inserted on each of these applications. Was the word or the figure "\$50.00" put in by you or was it there when you received these applications from the company?

A. No. It was there when I received the applications. No doubt the bookkeeper changed those, or whoever made them up, before they were signed. It is an old form. We had a new form out that year, but apparently he got hold of the wrong pad.

Mr. Dimond: Can we introduce those as one file?

The Court: It may be admitted.

The Clerk: Defendant's Exhibit B.

Q. (By Mr. Dimond): Mr. Parke, did you ever go before any United States Commissioner at Naknek and swear out a complaint against any of the officials of Pacific American Fisheries for violating Chapter 66, Session Laws of Alaska, 1949?

A. No.

Q. Were any warrants ever issued for the arrest of any of those officers at Naknek?

A. No.

Q. Or at any other cannery owned by [50] plaintiff?

A. No, there wasn't.

Q. After leaving Naknek on July 16th, 1949, or before that date, did you encounter any difficulties at any other of plaintiff's canneries in Alaska of a similar nature to those which you encountered at Naknek in collecting the tax?

A. No. Actually once it was over, well, actually before I got to P.A.F.'s cannery it was understood they were going to pay and pay under protest.

Q. It was understood throughout the industry?

A. Throughout the industry as a whole, why, it was pretty much routine collection right through. They knew what the other companies had done, and they were all throughout the industry pretty much on the same basis, and from one cannery to the other it would be the same routine.

Q. Did you ever threaten to tie up the fish pack, the cannery pack, at Naknek or any other of the plaintiff's canneries?

A. No. To my knowledge it would be no threat to tie up the pack of the cannery at all after quoting them the law and what the law amounted to.

(Testimony of Thomas S. Parke.)

which would indicate a pack could be tied up if the men were not allowed to fish.

Q. Did you ever make that statment to them?

A. I explained to them what the law was, but, as far as tying up a pack is concerned, I have no knowledge of it.

Q. I mean, did you inform them that, if they disobeyed the [51] law or refused to hire licensed fishermen, that the result could be that their pack could be tied up?

A. Well, it would show in the law what the result it would be as far as tying up the fishing.

Mr. Dimond: That is all I have.

#### Cross-Examination

By Mr. Faulkner:

Q. Mr. Parke, in other words, the law is what you were enforcing?      A. Yes, sir.

Q. You didn't have any alternative? I mean, the law told you what to do?

A. Yes. The law is definite there that a fisherman must have a license before fishing, and an employer that has employees that are unlicensed employees in his employment would be subject to arrest, too.

Q. And criminal prosecution?      A. Yes.

Q. And you told Mr. Edwards and Mr. Nelson that at Naknek?

A. Yes. I explained it to them, and to the best of my knowledge I went over on one of the pamphlets of the law, showed them what it was, and

(Testimony of Thomas S. Parke.)

showed them what it amounted to, and they understood it.

Q. They understood; you told them; you made them understand [52] that they could be subject to arrest if they continued without paying?

A. Yes, they understood it, and really their hands were tied as far as doing anything. It was the company that was supposed to notify them what to do.

Q. Yes. Now, that of course would depend on what the fishermen themselves would do? I mean, the fishermen, if the company didn't get authority to deduct this money from the fishermen in Bristol Bay or pay it, they would have to discharge those fishermen; and that is what you meant by tying up the pack?

A. It would be a case of either stopping the fishermen from fishing, and, if the fishermen would stop fishing, there would be no fish to pack.

Q. No.

A. In other words, there would be no pack up there.

Q. And that is probably what Mr. Edwards meant when he talked about tying up the pack?

A. I presume that is what he meant.

Q. Mr. Parke, did you have any warrants for any non-resident fishermen or representatives of companies at any other place that year?

A. Any other company cannery?

Q. Yes.



(Testimony of Thomas S. Parke.)

A. Yes, we did. We swore out complaints at the Alaska Packers [53] at Kvichak.

Q. At Kvichak? A. Two complaints.

Q. And that was prior to your visit to Naknek?

A. Up to this time; yes.

Q. Now, how many places did you visit that year, how many canneries, approximately, for collection of licenses?

A. Oh, it would take a little study to figure out what it was; all those in Bristol Bay, all of the principal ones. There were a few small salt fish and so on I didn't.

Q. Did you go to Port Moller?

A. No; not that far down; no.

Q. Squaw Harbor? A. No.

Q. Or King Cove?

A. We eliminate those. As far as getting there, the expense is too great.

Q. You hardly ever go there, do you?

A. No.

Q. Those licenses are collected through the company?

A. There is agreement to send them in. Ordinarily throughout the year, why, I run into their auditors or the men going down there, and they explain to the bookkeepers what to do, and they send them up.

Q. As a matter of fact, that is the practice everywhere at [54] these canneries of the plaintiff; they will collect the licenses, keep the accounting and make up the applications and send them in?

(Testimony of Thomas S. Parke.)

In other words, you don't go to the individual fishermen to collect the license fees, do you?

A. No. It is the general practice due to the fact that the way the law is written it is a big inconvenience to the canneries to have to have the individual get his license. It is due to the fact that maybe they are fishing and fishing is good and, well, in Bristol Bay, for instance, maybe one man is sick and the other man is a good fisherman and nobody to go out with him; well, if they have to go to, we will say, to a town to get a license before going on the grounds to fish, that would mean that, well, if one man is ready to go, they could, say, take, oh, a beachman or a man out of the shop or something of that sort, and all he would have to do is sign an application and send him out fishing, and in the matter of a few minutes he could be out, and we would pick up that application and issue the license later on.

Q. Yes. It is more convenient for everybody?

A. It seems to be. Everybody seems to be satisfied with it.

Q. And you say that it was understood throughout the industry after this occurrence in Bristol Bay that these fees would be paid under protest?

A. Yes. Each cannery would be routine. They all followed [55] up what the others had done.

Q. This was the first time in 1949 that you had any—I mean—strike that out. In 1949 at Naknek was the first time when you had any meeting with the non-resident fishermen themselves to discuss the law?

(Testimony of Thomas S. Parke.)

A. Yes; any formal meeting with them. Before I knew quite a few of them personally and mingled with them, but not officially.

Q. That was brought about by the fact that the Legislature had changed the law, the license tax, which the men resisted paying?

A. Yes. They wanted to find out what it was first hand, and the meeting would explain that.

Mr. Faulkner: I think that is all.

### Redirect Examination

By Mr. Dimond:

Q. One question. Mr. Parke, you spoke about some arrests at Kvichak. Were those officers of the Alaska Packers, or were they fishermen?

A. They were fishermen.

Mr. Dimond: That is all. I have no further testimony, your Honor.

(Witness excused.)

Mr. Faulkner: There is one other thing. I [56] don't know how binding it is, but I don't suppose there is any objection to it. I would like to state to the Court that I have had numerous conferences with the attorney for the Fishermen's Union, to which all these persons, mentioned in the complaint, belong, with reference to the collection of the amounts due them. If counsel has no objection, I will state what it is.

Mr. Dimond: No objection.

Mr. Faulkner: The Alaska Fishermen's Union is the union which brought the suit here in the Anderson case and the union to which all of these men belong. I think Mr. Anderson testified to that. Mr. Jackson in Seattle is the attorney for the union. This matter of refund has been discussed several times. I have had a great deal of correspondence with Mr. Jackson. I have been in conferences with him several times, and it has been agreed that no one will bring a suit for the refund of the license until this case is decided and that it is the desire of the members of the union that the company prosecute this action and get the refund for them. I think that is all we have.

Mr. Dimond: That is all we have.

The Court: Would the parties prefer to make an oral argument or submit it on briefs?

Mr. Dimond: It doesn't make any difference, your Honor, as far as I am concerned. The Court's calendar is crowded. I have a brief prepared. [57]

Mr. Faulkner: I have a brief, too.

The Court: Well, I think then that you might submit briefs. How much time do you want?

Mr. Faulkner: I have mine ready.

Mr. Dimond: Mine is all prepared, your Honor.

Mr. Faulkner: What I was going to is this, that, if I could have just a minute of the Court's time, on the phase of the case which involves payment to the company for these fees that were deducted, I might say that perhaps we didn't need to make that separation. We just brought this suit on behalf of the company and alleged that the com-

pany paid this money, paid all of it, and the company wants it back, and it is a matter between the company and the men as to what becomes of it, but we wanted to put the whole picture before the Court so there will be no question about it, and I just want to say now that we have no question about the sincerity of the Tax Commissioner and Mr. Parke. I think they are both very high-class officials, and they are doing what they think is best, and I want to see them protected, but, if the Court has any doubt about the matter, we could give them, as Mr. Fickel says in his letter there, assurance or guarantee that this money will be refunded to the men in those cases where it was deducted. I don't think that the company should be put to the expense of putting up a bond. We had a bond here once to secure the payment of all these taxes in 1949. That would be [58] rather expensive. I think the company would have no objection to giving Mr. Mullaney its own bond or its own guarantee in any form he wants it.

The Court: Well, does either party wish to say anything in advance of filing briefs as to the inferences to be drawn from the oral testimony or the documentary evidence put into the case this morning. I assume that of course you couldn't have dealt with the facts in your briefs because your briefs were already prepared. I just wondered whether you wished—now to make a brief oral statement as to the inferences that you think are reasonably deductible from the evidence submitted here.

Mr. Faulkner: I would appreciate that, your Honor. I don't think that the Court would want me to go over this brief—it is quite extensive and goes into all phases of it—so long as you are going to read it.

The Court: No.

(Whereupon, oral statements were made to the Court.)

(End of Record.) [59]

United States of America,  
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz., Pacific American Fisheries, Inc., a corporation, vs. M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, No. 6621-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 59, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 14th day of January, 1953.

/s/ MILDRED K. MAYNARD,  
Official Court Reporter, United States District  
Court, First Division, Territory of Alaska.

[Endorsed]: Filed January 15, 1953. [60]

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[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

United States of America,  
Territory of Alaska,  
First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause, and are the ones designated by Appellant and Appellee hereto, to constitute the record of appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 22nd day of January, 1953.

[Seal] /s/ J. W. LEIVERS,  
Clerk of District Court.

[Endorsed]: No. 13,696. United States Court of Appeals for the Ninth Circuit. Pacific American Fisheries, Inc., a corporation, Appellant, vs. M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, First Division.

Filed January 26, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.



